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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 35

ASBURY HOSPITAL, A CORPORATION,
APPELLANT

vs.

CASS COUNTY, NORTH DAKOTA, A PUBLIC CORPORATION, R. F. CROAL, AS STATES ATTORNEY OF CASS COUNTY, NORTH DAKOTA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

FILED FEBRUARY 6, 1945.

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[fol. 1]

IN DISTRICT COURT OF CASS COUNTY, FIRST JUDICIAL DISTRICT

ASBURY HOSPITAL, a Corporation, Plaintiff,

vs.

CASS COUNTY, NORTH DAKOTA, a Public Corporation; R. F. Croal as States Attorney of Cass County, North Dakota, and his Successors in Office; and Alvin C. Strutz as Attorney General of the State of North Dakota and his Successors in Office, Defendants

AMENDED COMPLAINT

Plaintiff for its cause of action against the defendants alleges:

I

That the defendant, Cass County, is a public corporation and is one of the duly established counties of the state of North Dakota; that the defendant, R. F. Croal is the duly elected, qualified and acting States Attorney in and for the County of Cass and State of North Dakota, and that he is joined herein in his official capacity as such States Attorney; that the defendant, Alvin C. Strutz is the duly elected, qualified and acting Attorney General of the State of North Dakota, and is joined herein in his official capacity as such Attorney General.

II

That the plaintiff, Asbury Hospital, is a corporation duly organized and existing under the laws of the state of Minnesota; that in the year 1899, or prior thereto, plaintiff was incorporated under the laws of the State of Minnesota under the name of Asbury Methodist Hospital and Rebecca Deaconess Home; and thereafter by amendment to its Articles of Incorporation its name was changed to Asbury and Rebecca Methodist Episcopal Hospital and Home; again and thereafter its name was changed to Asbury Hos-
[fol. 2] pital; the plaintiff is incorporated as a nonprofit corporation, with perpetual existence, under the laws of said state of Minnesota; that its Articles of Incorporation and the laws of the state of Minnesota provide that no

shares of stock shall ever be issued by said corporation; that it is a corporation of, and subject to the discipline of the Methodist Episcopal Church and is created and exists for religious and charitable purposes solely; that under the laws of the state of Minnesota said corporation has the power to sue in any court and to acquire by purchase or otherwise, hold, enjoy, improve, lease, encumber and convey real and personal property.

III

This action is brought for an injunction and for a declaratory judgment pursuant to the provisions of Chapter 237 of the Laws of 1923 of the State of North Dakota (Section 7712a1 to 7712a16 of the 1925 Supplement) known as the Uniform Declaratory Judgments Act.

IV

That prior to the year 1925 plaintiff became the owner by assignment and transfer from the estate of Maria H. Williams, of a certain note and mortgage for $3000.00, which said note and mortgage were made, executed and delivered by Theries D. Hinebauch and Priscilla Hinebauch, his wife, to Fargo Loan Agency, bearing date June 17th, 1914, by the terms of which said mortgagors, who were then and there the owners in fee simple of the Southeast quarter (SE ¼) of Section five (5), in Township one hundred forty (140), Range fifty-five (55) West of the 5th P. M. in Cass County, North Dakota, mortgaged said real property to the Fargo Loan Agency as mortgagee, and which said mortgage was duly recorded in the office of the Register of Deeds of Cass County, North Dakota, in Book "138" of Mortgages, at page 28, and which mortgage was then and there a valid, first and paramount lien upon said real property; said Fargo Loan Agency thereafter sold and assigned said mortgage to the said Maria H. Williams, who became the owner [fol. 3] thereof, and thereafter, through the estate of the said Maria H. Williams, plaintiff became the owner and legal holder of said mortgage and the indebtedness thereby secured; that thereafter and on November 27th, 1925; said mortgage being unpaid and in default, the real property hereinbefore mentioned and described was duly and regularly conveyed to this plaintiff in liquidation and satisfaction of said mortgage, and on November 27th, 1925, this

plaintiff became the owner of said real property and still is and remains the owner of record in fee simple of said real property hereinbefore mentioned and described.

V

That plaintiff is not engaged in the business of farming and agriculture; that said real property is farming land used and usable for farming and agriculture; that since the date of acquisition of said property by plaintiff, the same has been farmed by individuals who are residents of North Dakota, under the terms of various and sundry farm lease contracts upon the usual terms which prevail in the community in which said land is situated.

VI

That on the date that said mortgage was acquired by plaintiff, and on the date that it acquired title and ownership of said real estate, plaintiff had the right, power and authority under its Articles of Incorporation and under the laws of the State of Minnesota, to be and become the owner of said mortgage and of said real estate; that at the time and on the date that plaintiff became the owner of said mortgage and of said real estate, there existed in North Dakota no law or statute restricting or forbidding plaintiff's ownership of said mortgage or of said real estate, and that when said mortgage and said real estate were acquired by the plaintiff, plaintiff had the right under the laws of the state of North Dakota as they then existed, to be and become the owner of said mortgage and of said real estate, and to acquire title in and to said real property.

[fol. 4]

VII

That the plaintiff does not now own and never has owned real property in this state exceeding in value the sum of $500,000.00.

VIII

That at an election in the State of North Dakota held on June 29th, 1932, an initiated measure was voted upon by the electors of North Dakota, and that as a result of such election there was adopted an act purporting to prohibit corporation farming and relating to corporations acquiring and holding real estate not necessary in the operation of their business. Said act has been printed in the official

volume of the laws of North Dakota for the year 1933 on pages 494 and 495 thereof, to which reference is hereby made. Said legislation was thereafter amended by legislative enactment known as Chapter 89 of the Laws of 1933 for North Dakota, and was again amended by legislative enactment known as Chapter 111 of the Laws of North Dakota for the year 1935, to all of which enactments reference is hereby made. That by Section 25 of the Constitution of North Dakota said initiated measure became effective as law July 29th, 1932, and the ten year period therein referred to expires July 29th, 1942.

IX

That by the terms of said legislation it is provided in substance that if any corporation, either domestic or foreign, fails within ten years after said act becomes effective, to dispose of any real estate then owned by it and used or usable for farming and not reasonably necessary for the conduct of its business, then and in that event to such real estate shall escheat to the county in which said real estate is situated upon an action instituted by the States Attorney of such county, and said county shall within one year dispose of the same at public auction to the highest bidder, and that the proceeds of such sale, after all expenses of such procedure shall have been paid, shall be paid to the corpo-
[fol. 5] ration that formerly owned said land. That the defendants, unless restrained or enjoined, will enforce such legislation and will invoke the provisions thereof and will commence the necessary action or actions, to the end that title to such real estate shall escheat to the county; that by law the States Attorney and Attorney General are charged with the duty and responsibility of enforcing such legislation in their capacity as public officers, and that they, and each of them, will cause actions to be brought for the escheat of all tities to real estate held by corporations for the ten year period, or longer, and immediately following July 29th, 1942.

X

That an actual controversy exists between the plaintiff and the defendants; that the legal questions presented by the controversy set forth in this complaint are a matter of great public interest which affect a large number of persons and corporations and which involve the titles to lands

situated in substantially every county in the state of North Dakota; that various and divers corporations, their members, their creditors, and stockholders are and will be substantially affected by the operation and application of such legislation; that the various counties of the state and the various law enforcement officers thereof, are interested and affected by the application, enforcement and legal construction to be placed upon such legislation; that unless the legal questions presented by this complaint are determined, the various counties of the state and the various attorneys thereof will be obligated by law immediately following July 29th, 1942, to institute hundreds of suits for the escheat of titles to lands held by various and divers corporations; that corporate owners of lands will be charged with the responsibility, trouble, and expense of hundreds of suits which will be brought against corporate owners to escheat titles to real properties held and owned by them; that said legislation has not been judicially construed either as to its application or validity and that various and divers opinions have been given concerning the application, construction and [fol. 6] validity thereof, and that unless such legislation is judicially construed with respect to its application and validity, great loss and expense will be suffered and sustained by numerous corporate owners of real properties used and usable for farming in the state of North Dakota.

That plaintiff, in addition to the land which it owns in Cass County, North Dakota, and which was heretofore described, is the owner of other real property in this state used or usable for farming, the principal portion of which was acquired either through foreclosure of mortgages or through deed given in satisfaction and payment of mortgages, which other lands now owned by it, together with the date on which legal title was acquired, are as follows, to-wit:

Description	County	Date of Acquisition
SW 1/4 of 14-143-68	Stutsman	5-26-27
S 1/2 of 32-162-90	Burke	5-11-27
NW 1/4 of 13-143-63	Stutsman	3-12-32
S 1/2 NE 1/4, N 1/2 SE 1/4 of 32-163-69	Rolette	6- 8-32
NE 1/4 of 19-163-85	Renville	9-25-22
W 1/2 of 25-137-63	Stutsman	9-27-32
E 1/2 E 1/2 of 14-162-56	Pembina	9-15-25
W 1/2 W 1/2 of 13-162-56	Pembina	9- 5-25
SW 1/4 of 12-160-65	Towner	3-29-30
SW 1/4 of 5-163-59	Cavalier	12-10-28
W 1/2 of 15-159-69	Rolette	5- 3-25
E 1/2 of 14-159-69	Rolette	10- 8-26

Description	County	Date of Acquisition
E 1/2 of 16–159–61	Rolette	5– 8–25
NW 1/4 & W 1/20 of NE 1/4 of 28–144–56	Steele	5– 5–24
NE 1/4 of 17–144–56 (less roadway)	Steele	
NW 1/4 of 17–144–56	Steele	2–29–24
SW 1/4 of 14–144–57	Steele	8–21–31
N 1/2 (less roadway) of 33–144–56	Steele	5– 6–24
NW 1/4 of 3–134–58	Ransom	4–19–24
NW 1/4, Frac. N 1/2 SW 1/4, Frac. SE 1/4 NE 1/4 33–140–96	Stark	6– 8–32
SE 1/4 of 26; NE 1/4 of 35–149–60	Nelson	8–21–31
Lots 3 & 4 of 18; E 1/2 NW 1/4, Lots 1 & 2 of 19–162–58	Cavalier	11–18–29
SW 1/4 of 20–161–86	Renville	
NW 1/4 of 34–161–87	Renville	9–11–35
S 1/2 SE 1/4, S 1/2 SW 1/4 of 9–163–64	Cavalier	6– 4–31
NW 1/4, NW 1/4 SW 1/4 of 35–159–71	Rolette	4–19–30
SE 1/4 of 36–164–64	Cavalier	3–19–36
SE 1/4 of 22; NW 1/4 of 26–161–67	Towner	
SE 1/4, E 1/2 SW 1/4, Lots 3 & 4 of 31–162–100	Divide	9– 9–22
S 1/2 NW 1/4, Lots 3 & 4 of 3–160–85	Renville	11–17–25
NE 1/4 of 14–161–85	Renville	8–10–32
E 1/2 SW 1/4, Lots 3 & 4 of 7–160–82	Bottineau	4–19–26
W 1/2 of 9–161–86	Renville	9–23–25
S 1/2 SW 1/4 of 1; N 1/2 NW 1/4 of 12–160–83	Bottineau	
NE 1/4 of 6–161–64	Cavalier	

[fol. 7] Plaintiff further alleges that a decision and determination upon the questions presented by this complaint, directly affect a large number of other religious, benevolent, charitable, and educational institutions who are now the owners of real property situated in the state of North Dakota, and which was acquired by them as a result of investments in North Dakota mortgages which upon foreclosure vested title in such corporations as mortgagees, or which were acquired through deeds of gift, or which were acquired through various devises and bequests of individuals who owned such property and who desired to devote the same to the work of such corporations. That among other corporations of this kind and character who are directly affected by such legislation and whose interests are thereby affected, and whose titles in part, although acquired after 1932, were acquired pursuant to mortgages held by them and given prior to 1932, are the following:

(a) St. Mary's Hall, Faribault, Minnesota, a Minnesota corporation operating an Episcopal School for girls:

Legal Description	County	Date Acquired
NW 1/4 of 16–150–86	McLean	11/ 6–26
SE 1/4 of 25–162–68	Towner	5/31–31

(b) St. Marks Church, a religious corporation of Minneapolis, Minnesota, an Episcopal Church:

Legal Description	County	Date Acquired
SW 1/4 (less R/W) of 8–163–98	Divide	3–11–35
W 1/2 NW 1/4 of 34–151–82	Ward	11–21–32

(c) Lakewood Cemetery Association, a Minnesota corporation, of Minneapolis, Minnesota:

Legal Description	County	Date Acquired
NE 1/4 of 8; NW 1/4 of 9–162–62	Cavalier	5/13–40
NE 1/4, E 1/2 SE 1/4 17; E 1/2 NE 1/4 of 20–159–85	Renville	7–27–27
N 1/2 of 26–160–87	Ward	2–20–33
NW 1/4, W 1/2 NE 1/4, N 1/2 SW 1/4 of 21–163–63	Cavalier	8–11–29
S 1/2 SW 1/4 of 35–163–67	Towner	
W 1/2 SW 1/4; SW 1/4 NW 1/4 of 22; NW 1/4 NW 1/4 of 27–159–88	Ward	2–10–30
NW 1/4 SE 1/4, N 1/2 SW 1/4, SW 1/4 SW 1/4 of 5–151–79	McHenry	
[fol. 8]		
SW 1/4 of 35–163–84	Renville	5– 2–32
N 1/2 SW 1/4; W 1/2 SE 1/4; S 1/2 SW 1/4 15; E 1/2 NW 1/4 of 22–143–72	Pierce	7–23–32
SE 1/4 of 21; SW 1/4 of 22–162–65	Towner	10–26–31
SW 1/4 of 34–149–57	Nelson	5– 7–30
SW 1/4 of 14–151–89	Mountrail	7–25–32
SW 1/4 of 10–149–51	Grand Forks	4–30–29
NE 1/4 of 9; NW 1/4 of 10–161–70	Rolette	8–18–26
W 1/2 of 11; S 1/2 NE 1/4, SE 1/4 of 15; Part NW 1/4 14–137–58	Barnes	6– 6–36
S 1/2 NE 1/4, Lots 1 & 2 of 3–130–63; SW 1/4 35–131–63	Dickey	1– 2–36
SW 1/4 of 2–162–65	Towner	5–12–32

(d) Boards of Home & Foreign Missions of the Presbyterian Church of the United States (representing investments of Church Endowment Funds.)

Legal Description	County	Date Acquired
E 1/2 of 36–161–64	Cavalier	4– 6–31
SW 1/4 of 8–160–60	Cavalier	
NW 1/4 of 32–160–61	Cavalier	3–26–28
SE 1/4 of 25–163–67	Towner	3–28–31
SW 1/4 of 27; S 1/2, NE 1/4 of 28; SE 1/4 of 34–163–101	Divide	2–28–39
SE 1/4 of 12; Frac. SE 1/4 of 1–145–58	Griggs	10–28–31
E 1/2 NW 1/4, Lots 1 & 2 of 31–162–86	Renville	3–16–28
SW 1/4 of 12–161–65	Towner	3– 2–30

(e) First Presbyterian Church, a religious corporation, of Minneapolis, Minnesota:

Legal Description	County	Date Acquired
NE 1/4 of 36–153–78	McHenry	6–10–26

(f) Washburn Memorial Orphan Asylum, a charitable corporation, of Minneapolis, Minnesota, engaged in the business of furnishing homes for orphans:

Legal Description	County	Date Acquired
SE 1/4 of 30; N 1/2 SW 1/4, SW 1/4 SW 1/4 of 32; NN 1/2 NE 1/4 31; 1/2 NW 1/4 of 32–161–86	Renville	9– 9–26
NE 1/4 of 2–160–87	Ward	
S 1/2 SE 1/4, NW 1/4 SE 1/4, SE 1/4 NW 1/4 of 35; SW 1/4 NE 1/4 of 34–153–64	Benson	7– 8–33
W 1/2 NW 1/4 of 34–132–56	Sargent	
S 1/2 SE 1/4, Lots 1 & 2 of 28–164–64	Cavalier	10– 5–36
S 1/2 NW 1/4 of 14; SW 1/4 SW 1/4 of 11; S 1/2 NE 1/4 15–158–101	Williams	6–27–32
E 1/2 W 1/2, NE 1/4 of 15–160–96	Divide	4– 1–26
SE 1/4 (less 6.05 acres) of 10–163–99	Divide	6– 5–31

(g) Womens Christian Assn. of Minneapolis, Minnesota, a charitable and benevolent corporation of Minnesota:

[fol. 9]

Legal Description	County	Date Acquired
SW 1/4 of 14–143–68	Stutsman	5–26–27

(h) Family Welfare Association, a charitable corporation of Minneapolis, Minnesota:

Legal Description	County	Date Acquired
S 1/2 of 32–162–99	Burke	5–11–27
NW 1/4 of 13–143–63	Stutsman	3–12–32
S 1/2 NE 1/4, N 1/2 SE 1/4 of 32–163–69	Rolette	6– 8–32
NE 1/4 of 19–163–86	Renville	9–25–22

(i) Citizens Aid Society, a charitable corporation, of Minneapolis, Minnesota:

Legal Description	County	Date Acquired
W 1/2 of 25–137–63	Stutsman	9–27–32

(j) Jones-Harrison Home, a charitable organization, of Minneapolis, Minnesota, which provides and maintains a home for aged and poverty stricken residents:

Legal Description	County	Date Acquired
SE 1/4 of 26; NE 1/4 of 35–149–60	Nelson	8–21–31

(k) Wm. Hood Dunwoody Industrial Institute, an educational corporation, of Minneapolis, Minnesota, an endowed school for the training of young people:

Legal Description	County	Date Acquired
Lots 3 & 4 of 18; E 1/2 NW 1/4, Lots 1 & 2 of 19–162–58	Cavalier	11–18–29

(l) Home for Children and Aged Women, a charitable corporation, of Minneapolis, Minnesota, to furnish aid and assistance to children and aged women:

Legal Description	County	Date Acquired
SW 1/4 20–161–86	Renville	
NW 1/4 34–161–87	Renville	9–11–35
S 1/2 SE 1/4, S 1/2 SW 1/4 of 9–163–64	Cavalier	6– 4–31
NW 1/4, NW 1/4 SW 1/4 of 35–159–71	Rolette	4–19–30
SE 1/4 of 36–164–64	Cavalier	3–19–36
SE 1/4 of 22; NW 1/4 of 26–161–67	Towner	3–19–36

(m) Springdale Cemetery Association, of Peoria, Illinois, a corporation under the laws of the state of Illinois:

Legal Description	County	Date Acquired
SE 1/4, E 1/2 SW 1/4, Lots 3 & 4 of 31–162–100	Divide	9– 9–22

[fol. 10] (n) Young Womens Christian Association, a Benevolent Corporation, of Minneapolis, Minnesota:

Legal Description	County	Date Acquired
S 1/2 NW 1/4, Lots 3 & 4, of 3–160–85	Renville	11–17–25

(o) Northwestern Hospital Association, an Endowed Hospital Corporation, of Minneapolis, Minnesota:

Legal Description	County	Date Acquired
NE 1/4 14–161–85	Renville	8–10–32
E 1/2 SW 1/4, Lots 3 & 4 of 7–160–82	Bottineau	4–19–26

(p) First Universalist Society, a religious corporation, of Minneapolis, Minnesota:

Legal Description	County	Date Acquired
W 1/2 of 9–161–86	Renville	9–23–2
S 1/2 SW 1/4 of 1; N 1/2 NW 1/4 of 12–160–83	Bottineau	
NE 1/4 of 6–161–64	Cavalier	

(q) Macalester College, an educational and religious corporation of Minnesota:

Legal Description	County	Date Acquired
NW 1/4 NE 1/4 and S 1/2 NE 1/4 Section 20; SW 1/4 NW 1/4 Sec. 21	Benson	3-29-26
E 1/2 and SW 1/4 Sec. 17-149-66	Eddy County	3-24-32
SE 1/4 26 & NE 1/4 and N 1/2 SE 1/4 35-147-61	Foster	3-27-29
W 1/2 15; SW 1/4 10-146-66	Foster	9-19-29
W 1/2 7-144-61	Griggs	9-18-28
S 1/2 22-144-62	Stutsman	6-15-29
S 1/2 N 1/2 30-147-63	Foster	7-12-39
E 1/2 & SW 1/4 10-146-65	Foster	2-14-34
SE 1/4 Sec. 18-155-79	McHenry	9-30-38
SW 1/4 Sec. 25-133-51	Richland	8-23-37
NE 1/4 Sec. 19-149-72	Wells	10-13-36

Among the other corporations of like character who are adversely affected by the operation and enforcement of such legislation are:

North Dakota Conference of the Methodist Church, a North Dakota Corporation;

St. Olaf College, of Northfield, Minn., a Norwegian Lutheran College;

Carleton College, of Northfield, Minnesota;

Concordia College, of Moorhead, Minnesota, a Lutheran College.

That each and all of said religious, charitable, benevolent [fol. 11] and educational corporations hereinbefore referred to, are the owners of farm lands used and usable for farming in North Dakota, acquired through investments of their trust moneys and funds, and acquired through donations, gifts, devises and bequests; that said farm properties are located in substantially every county of the state of North Dakota, and that their affairs and respective holdings are directly affected, and they are directly interested in the outcome of this action.

That with respect to each and all of said corporations the greater part of the lands which they now own as hereinbefore set forth, were either acquired prior to the year 1932, or were subsequently acquired as a result of mortgages taken prior to 1932 but foreclosed subsequent to 1932; and plaintiff further alleges that at the time said mortgages were taken by said corporations, or when the title to said real properties were taken by said corporations, that said corporations, and each of them, had the right and power under their Articles of Incorporation and under the Laws

of the State in which they were incorporated, and under the laws of the State of North Dakota, to take, acquire, and to hold the same.

XI

Plaintiff contends the law to be, that to apply and enforce said corporate farming legislation as against the plaintiff and as against its said real property would be to render such corporation farming legislation invalid, void and unconstitutional.

That if said legislation is construed to be applicable to the property of the plaintiff, that such legislation would be contrary to and in conflict with the following provisions of the Constitution of the United States, to-wit:

(a) Article I, Section 10, which reads in part as follows:

"No state shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts * * *"

(b) Article 14, Section 1, Amendments of the Con- [fol. 12] stitution, which reads in part as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

(c) Article 4, Section 2, which reads in part as follows:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

(d) Fifth Amendments to the Constitution of the United States, which reads in part as follows:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

That if said legislation is construed to be applicable to the property of the plaintiff, that such legislation would be con-

trary to and in conflict with the following provisions of the Constitution of the State of North Dakota, to-wit:

(a) Article I, Section 11, which reads in part as follows:

"All laws of a general nature shall have a uniform operation."

(b) Article I, Section 13, which reads in part as follows:

"No person shall * * * be deprived of life, liberty or property without due process of law."

(c) Article I, Section 16, which reads as follows:

"No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed."

(d) Article I, Section 20, which reads in part as follows:

"No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class or citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

(e) Article I, Section 22, which reads as follows:

"All courts shall be open and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct."

XII

Plaintiff requests the Court to take judicial notice of such [fol. 13] legislative, executive and judicial acts of the State and National Government, and of such general economic and other conditions as by law the Court is authorized to take judicial notice of.

XIII

That although plaintiff has attempted since the year 1930 to sell the land described in paragraph 4 hereof, it has been unable to sell said land at any time for the amount due on the mortgage originally thereon; that it will not be able to sell the same for the amount of said mortgage prior to July 29th, 1942; that any sale which plaintiff might make prior to said date would have to be made at a price substantially below the amount of money which plaintiff had invested therein; that any sale of the property which might be made by the County pursuant to the application and operation of said corporate farming law, would result in a sale at a price below the amount of said mortgage and there would in addition be deducted therefrom all the costs and expenses of such procedure.

XIV

That said real estate above described is not necessary for the conduct of the plaintiff's business, excepting in the following respects: Plaintiff is permitted by the laws of the State of Minnesota to make investments of funds not immediately required for its operations and the ownership of said mortgage or mortgages and the subsequent acquisition of title to the lands covered by said mortgages, represents a legal and lawful function and exercise of one of the powers of the plaintiff as a corporation; that the holding of such surplus funds in such investments is a legal and lawful function and power of plaintiff as a corporation and such investments constitute a part of the conduct of its business.

XV

Plaintiff further alleges that said land is used and usable for farming; that in order that the same may be cropped for and during the year 1942, it is necessary that a farm [fol. 14] contract be made with a resident of North Dakota to farm said real estate during the farming season of 1942; that by the terms of said legislation, an action may be brought to escheat said real property after July 29th, 1942, at which time the crops raised and growing on said real estate will not be fully severed, harvested and removed from the real estate; that the cropper who crops said land will not know his rights and liabilities with respect to said

real property, and this plaintiff, as the owner of said land, will not know and be able to ascertain and determine its right or ownership of the crops raised on said land during the year 1942, and that said lands cannot be farmed during the year 1942 without substantial investment of seed and labor and that in cropping the same, such cropping can be done only at the risk of loss if said legislation is declared to be legal, valid and enforcible.

XVI

That plaintiff has no plain, speedy, or adequate remedy at law; that a decree of this Court is necessary declaring the law, in order to avoid a multiplicity of suits; that unless this Court exercises its discretion to take jurisdiction of this controversy and to render a declaratory judgment and grant an injunction, plaintiff, and others similarly situated can litigate the legal questions presented herein only at the risk of great loss and at great expense.

Wherefore, Plaintiff prays that the Court enter its judgment and decree as follows:

1. Adjudging and determining that said initiated measure and all amendments thereto purporting to regulate corporate ownership, acquisition and disposition of farm lands, is not applicable to farm lands used or usable for farming in the state of North Dakota, or interests therein evidenced by valid liens or mortgages, where such titles, liens or mortgages were legally and validly acquired prior to July 29th, 1932, the effective date of said legislation;

2. That the Court adjudge and decree that if such legislation is applicable to plaintiff and its property so ac- [fol. 15] quired prior to the enactment of such legislation, that then and in that event such legislation is null, void, invalid, unconstitutional and unenforcible;

3. That the Court adjudge and decree that the said initiated measure is null, void, invalid, unconstitutional and unenforcible for the reason that the same is discriminatory in its character; that the same is confiscatory, takes property without due process of law, and is a constitutional impairment of vested rights and interests;

4. That the defendants, and each of them, be enjoined, pending the final determination of this action, from insti-

tuting any action or proceeding for the enforcement of such legislation as against this plaintiff, and that a perpetual injunction be issued against the defendants, and each of them, and their respective successors in office, from enforcing or attempting to enforce such legislation against the plaintiff's real property;

5. That the Court consider and construe said legislation with respect to the issues herein raised and grant to the plaintiff such other and further relief as to the Court may seem just and equitable.

Dated this 5th day of December 1941.

Nilles, Oehlert & Nilles, Attorneys for plaintiff, 504 Black Building, Fargo, N. Dak.

Duly sworn to by H. G. Nilles, jurat omitted in printing.

[fol. 16] IN DISTRICT COURT OF CASS COUNTY

[Title omitted]

DEMURRER

Now come the above named defendants and demur to the complaint of the plaintiff in the above entitled action upon the ground that the said complaint does not state facts sufficient to constitute a cause of action.

Dated this 8th day of ~~December, 1941~~.

Alvin C. Strutz, Attorney General; William R. Pearce, Assistant Attorney General; Ralph F. Croal, State's Attorney for Cass County, North Dakota, Attorneys for Defendants.

[fol. 17] IN DISTRICT COURT OF CASS COUNTY

[Title omitted]

ORDER SUSTAINING DEMURRER

The above entitled action came on for hearing and determination upon the demurrer of the defendants to the amended complaint of the plaintiff on December 17th, 1941 at Fargo, North Dakota. Plaintiff was represented upon oral argument by Attorneys Nilles, Oehlert & Nilles and

the defendants by Honorable Alvin C. Strutz, Attorney General. The Court having carefully considered the arguments and briefs of counsel, and being fully advised in the premises, the Court is of the opinion that the subject matter of this action and the facts therein set forth are a proper action for a declaratory judgment. The Court is further of the opinion that upon the other issues presented in the complaint, that the demurrer to said amended complaint should be sustained.

It is in accordance therewith, Ordered, that the demurrer of the defendants to the amended complaint of the plaintiff be and the same is hereby sustained.

Dated this 6th day of January, 1942.

By the Court: P. G. Swenson, Judge of the District Court.

[fol. 18] In District Court of Cass County

[Title omitted]

Findings of Fact, Conclusions of Law and Order for Judgment

This matter came on for final hearing and determination before the Court; and it appearing to the Court that heretofore this Court sustained the demurrer to the complaint, from which intermediate order an appeal was taken to the Supreme Court of North Dakota, and it appearing to the Court that said order was by said Court affirmed, as appears from the decision of said Court reported in Asbury Hospital vs. Cass County, et al., 7 N. W. (2d) 438, and said cause having been remanded to this Court for further proceedings conformable to law, and plaintiff having elected to plead no further, and defendants having elected to plead no further, the Court having considered all the records and files herein, and being fully advised in the premises by counsel for the respective parties, the Court does now make and file the following:

Findings of Fact

I

The Court finds as true the allegations of fact set forth in the amended complaint herein.

* * * * * * *

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. This action was properly brought for a declaratory [fol. 19] judgment under the Declaratory Judgments Act of this State and the facts present an actual controversy of a justiciable character between the parties having adverse interests.

2. The initiated statute of North Dakota (Laws 1933, page 494, Sections 4 and 5 and Sections 1 and 3, as amended by Laws 1933, c. 89) requiring corporations to dispose of realty usable for agriculture, may be constitutionally applied to realty acquired before the adoption of the statute, or acquired by foreclosure of mortgage executed before the adoption of the statute.

3. Plaintiff was not brought within the statutory exception authorizing corporations to continue to hold realty usable for agriculture if "reasonably necessary in the conduct of their business" merely because its articles of incorporation authorized it to acquire and hold realty.

4. The enforcement of said initiated measure of North Dakota against the plaintiff, would not deprive the plaintiff of its property without due process of law, or deny to it the equal protection of the law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

5. Said initiated measure does not operate to impair the obligation of contract between the State and the plaintiff, or impair or divest any vested property right, and within the meaning of the Fourteenth Amendment of the Constitution of the United States and within the meaning of Article 4, Section 2 thereof.

6. The Fourteenth Amendment of the Constitution of the United States prohibits denial of equal protection of the laws only to persons within the jurisdiction of the State and cannot be relied upon by the plaintiff in this case.

7. Plaintiff is not a citizen within the meaning of Article 4, Section 2 of the Constitution of the United States governing privileges and immunities of citizens.

[fol. 20] 8. Plaintiff could not be injured by the amendment to said law discriminating in favor of corporations as defined therein, and hence cannot urge such discrimination in claiming such statute to be unconstitutional.

9. Said initiated measure, as against the plaintiff, is not in contravention of any of the provisions of the Constitution of the United States, or amendments thereto, set forth in the bill of complaint herein; neither is said legislation in violation of or in contravention of any of the provisions of the Constitution of the State of North Dakota relied upon by the plaintiff in the bill of complaint.

10. This Court having assumed jurisdiction of this case as one properly brought for a declaratory judgment and for injunctive relief, and having declared the law, now does, in accordance with such declaration, deny plaintiff's application for perpetual injunction against the defendants, prohibiting defendants and their successors in office from enforcing or attempting to enforce such legislation against the plaintiff's property.

Let Judgment Be Entered According to the Attached Form of Judgment Which Is Hereby Approved.

Dated this 15th day of December, 1943.

By the Court: P. E. Swenson, Judge of the District Court.

[fol. 21] In District Court of Cass County, First Judicial District

Asbury Hospital, a Corporation, Plaintiff,

vs.

Cass County, North Dakota, a Public Corporation; R. F. Croal as States Attorney of Cass County, North Dakota, and his Successors in Office; and Alvin C. Strutz as Attorney General of the State of North Dakota and his Successors in Office, Defendants

Judgment—December 15, 1943

This matter came on for final hearing and determination before the Court; and it appearing to the Court that heretofore this Court sustained the demurrer to the complaint,

from which intermediate order an appeal was taken to the Supreme Court of North Dakota, and it appearing to the Court that said order was by said Court affirmed, as appears from the decision of said Court reported in *Asbury Hospital vs. Cass County*, et al., 7 N. W. (2d) 438, and said cause having been remanded to this Court for further proceedings conformable to law, and plaintiff having elected to plead no further, and defendants having elected to plead no further, the Court having considered all the records and files herein, and being fully advised in the premises by counsel for the respective parties, and the Court having found the allegations of fact set forth in the complaint to be true, and having made and filed herein its Findings of Fact, Conclusions of law and Order for Judgment, it is now in accordance therewith—

Declared, Adjudged and Decreed, as follows:

1. This action was properly brought for a declaratory judgment under the Declaratory Judgments Act of this State and the facts present an actual controversy of a justiciable character between the parties having adverse interests.

2. The initiated statute of North Dakota (Laws 1933, page [fol. 22] 494, Sections 4 and 5 and Sections 1 and 3, as amended by Laws 1937, c. 89) requiring corporations to dispose of realty usable for agriculture, may be constitutionally applied to realty acquired before the adoption of the statute, or acquired by foreclosure of mortgage executed before the adoption of the statute.

3. Plaintiff was not brought within the statutory exception authorizing corporations to continue to hold realty usable for agriculture if "reasonably necessary in the conduct of their business" merely because its articles of incorporation authorized it to acquire and hold realty.

4. The enforcement of said initiated measure of North Dakota against the plaintiff, would not deprive the plaintiff of its property without due process of law, or deny to it the equal protection of the law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

5. Said initiated measure does not operate to impair the obligation of contract between the State and the plaintiff, or impair or divest any vested property right, and within

the meaning of the Fourteenth Amendment of the Constitution of the United States and within the meaning of Article 4, Section 2 thereof.

6. The Fourteenth Amendment of the Constitution of the United States prohibits denial of equal protection of the laws only to persons within the jurisdiction of the State and cannot be relied upon by the plaintiff in this case.

7. Plaintiff is not a citizen within the meaning of Article 4, Section 2 of the Constitution of the United States governing privileges and immunities of citizens.

8. Plaintiff could not be injured by the amendment to said law discriminating in favor of corporations as defined therein, and hence cannot urge such discrimination in claiming such statute to be unconstitutional.

9. Said initiated measure, as against the plaintiff, is not in contravention of any of the provisions of the Constitution [fol. 23] of the United States, or amendments thereto, set forth in the bill of complaint herein; neither is said legislation in violation of or in contravention of any of the provisions of the Constitution of the State of North Dakota relied upon by the plaintiff in the bill of coniplaint.

10. This court having assumed jurisdiction of this case as one properly brought for a declaratory judgment and for injunctive relief, and having declared the law, now does, in accordance with such declaration, deny plaintiff's application for perpetual injunction against the defendants, prohibiting defendants and their successors in office from enforcing or attempting to enforce such legislation against the plaintiff's property.

Witness the Honorable P. G. Swenson, Judge of the District Court, my hand, and the seal of said Court, this 15th day of December, 1943.

H. D. Arnold, Clerk of the District Court By ——, Deputy. (Seal.)

[fol. 24] IN SUPREME COURT OF NORTH DAKOTA

ASBURY HOSPITAL, a Corporation, Plaintiff, and Appellant,

vs.

CASS COUNTY, North Dakota, a Public Corporation, R. F. Croal, as State's Attorney of Cass County, North Dakota, and His Successors in Office, and Alvin C. Strutz as Attorney General of the State of North Dakota and His Successors in Office, Defendants and Respondents

JUDGMENT—Filed November 3, 1944

This action coming on to be heard at the October A. D. 1944 term of this Court at the Supreme Court rooms in the City of Bismarck, State of North Dakota:

Present: Hon. James Morris, Chief Justice; Hon. A. M. Christianson, Hon. W. L. Nuessle, Home. Thomas J. Burke, and Hon. Harvey J. Miller, one of the Judges of the Sixth Judicial District, Associate Justices; and the appeal herein having been argued by Messrs. Nilles, Oehlert & Nilles for the Appellant and by Mr. William R. Pearce, Special Assistant Attorney General for Respondent and the court having been advised thereon it is now considered, ordered and adjudged that the judgment of the said District Court within and for said Cass County appealed from herein, be and the same is hereby Affirmed.

And It Is Further Ordered, That this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the order of this court.

And It Is Further Considered And Adjudged, That Respondents have and recover of the Appellant costs and disbursements on this appeal expended, to be taxed and allowed in the District Court.

Dated November 3, 1944.

By the Court, James Morris, Chief Justice.

Attest: J. H. Newton, Clerk. (Seal, Supreme Court, State of North Dakota.)

[fol. 25] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To Honorable A. M. Christianson, the Chief Justice of the Supreme Court of the State of North Dakota:

Your petitioner, Asbury Hospital, a corporation, respectfully shows to the Court:

1. That your petitioner is the plaintiff and appellant in the above entitled cause.

2. That on December 5, 1941, this action was brought in the District Court of Cass County under the Uniform Declaratory Judgments Act of the State of North Dakota (Chapter 237 of the North Dakota Session Laws for 1923, also cited as Sections 7712a1 to 7712a16 of the 1925 Supplement to the N. D. C. L. 1913) to secure a judicial declaration and judgment that certain real property owned by the appellant and located in Cass County, North Dakota, is not subject to the provisions of the Initiative Measure adopted in North Dakota on June 29, 1932, and entitled "An Act Prohibiting Corporation Farming and Relating to Corporations Acquiring and Holding Real Estate Not Necessary in the Operation of Their Business." (See North Dakota Session Laws for 1933, pp. 494 and 495, and as amended by Chapter 89 of the North Dakota Session Laws for 1933, and as further amended by Chapter 111 of the North Dakota Session Laws for 1935). An injunction against the enforcement of said law was also prayed for.

That by the terms of such legislation and Initiative Measure, it is provided in substance that, if any corporation, either domestic or foreign, fails, within ten years after said act becomes effective to dispose of any real estate then owned by it, which is used or usable for farming, and [fol. 26] not reasonably necessary for the conduct of its business, then and in that event, title to such real estate shall escheat to the county in which said real estate is situated upon an action instituted by the State's Attorney of such county, and said county shall within one year dispose of the same at public auction to the highest bidder, and that the proceeds of such sale, after all expenses of such procedure shall have been paid, shall be paid to the corporation that formerly owned said land; that said Initiative Measure

became effective as law in the State of North Dakota on July 29, 1932; that the plaintiff is a non-profit corporation, organized under the laws of the State of Minnesota, and became the owner of the farm land heretofore referred to in November 1925.

3. That in its amended Complaint in such action, the appellant alleged among other things that the application of such Initiative Measure to the appellant and to its said real estate would infringe upon and violate the rights guaranteed to it by Section 1 of the Fourteenth Amendment, as well as Article 1 Section 10, Article 4 Section 2, and the Fifth Amendment to the Constitution of the United States.

4. That appellant's amended Complaint further alleged that on the date it acquired title to and ownership of such real property, appellant had the right and power under its Articles of Incorporation and the laws of Minnesota to be and become the owner of such real property, and that at the time it became the owner thereof, there existed no law or statute in North Dakota restricting or forbidding appellant's ownership of said land, and that when such real estate was so acquired by it, appellant had the right under the laws of the State of North Dakota as they then existed to be and to become the full, unrestricted and unconditional owner of such real property, and to acquire a full, complete and indefeasible title in and to such real property.

5. That such Complaint further alleged that the defendant, Cass County, and the defendant, R. F. Croal, the duly elected State's Attorney of said County, and the defendant, Alvin C. Strutz, as Attorney General of the State of North [fol. 27] Dakota, and their successors in office, unless restrained and enjoined from so doing, will enforce such initiated law, and will commence action to the end that the title to such real estate shall escheat to said Cass County immediately following lapse of the ten-year period and immediately following July 29, 1942, in accordance with the provisions of such Initiative Measure.

6. It is further alleged in such Complaint that an actual controversy exists between the appellant and the appellees as to the applicability of such Initiated Measure to the appellant and its said real property, and as to whether such legislation, if applicable, is violative of the constitutional rights of the appellant under the above mentioned con-

stitutional provisions, and whether such legislation is repugnant thereto.

7. In its Complaint, the appellant prayed judgment that such Initiative Measure be adjudged not applicable to the plaintiff or its said real estate acquired prior to July 29, 1932, the effective date of such legislation, and that if the Court adjudge and declare that such legislation is applicable to the appellant and its said real estate then and in that event the Court further adjudge that such legislation is void as unconstitutional under the above mentioned constitutional provisions.

8. To such Complaint, the defendants interposed their joint Demurrer upon the ground that such Complaint does not state facts sufficient to constitute a cause of action, and said District Court of Cass County sustained such Demurrer. That from the order sustaining such Demurrer, an appeal was taken to the Supreme Court of the State of North Dakota, and that such Court by its decision affirmed the order sustaining the Demurrer, holding however that the case presented was one which was the proper subject of a declaratory judgment, and proceeded further to hold and determine the provisions of such Initiative Measure valid as constitutional, and applied the same to the appellant and such land owned by it in Cass County, North Dakota. Such decision further holds that such initiated measure was valid as constitutional and does not operate [fol. 28] to infringe upon or deny to the appellant any rights guaranteed to it by the provisions of the Constitution of the United States heretofore referred to. Such decision of the Supreme Court of the State of North Dakota is reported in *Asbury Hospital vs. Cass County et al.*, 72 N. D. 359, 7 N. W. (2d) 438.

9. That under the laws pertaining to the practice and procedure in the State of North Dakota, such appeal from the order sustaining the Demurrer constituted an appeal from an intermediate order and was not an appeal from a final judgment. (Sec. 7832 of the N. D. C. L. 1913 and see *Devereaux vs. Katz*, 22 N. D. 351, 133 N. W. 553; *Langer vs. Courier News*, 48 N. D. 280, 183 N. W. 1009; and *Asbury Hospital vs. Cass County et al*, — N. D. —, 16 N. W. (2d) 523.

10. Following the remand of the case to the District Court of Cass County, North Dakota, further proceedings

were had, and the matter came on before such Court on December 15, 1943, and the appellant and appellees, having elected to plead no further, the Court proceeded to make and file findings of fact, conclusions of law, order for judgment, and judgment; finding as true the allegations of fact asset forth in plaintiff's said Complaint. Said District Court however denied the relief sought by the appellant, except to declare the law in accordance with the decision of the Supreme Court of North Dakota, and thereupon a final judgment was duly entered in said trial Court on December 15, 1943. From such final judgment, the appellant again appealed to the Supreme Court of the State of North Dakota, which is the highest court of said state in which a decision in this suit can be had; that in such appeal to the Supreme Court of the State of North Dakota, the appellant raised and asserted the same errors and raised the same questions arising under the Constitution of the United States as were raised in the appeal from the intermediate order sustaining said demurrer, and the errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the Assignment of Errors filed herewith; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States.

[fol. 29] 11. That upon such appeal from such judgment to the Supreme Court of the State of North Dakota, there was drawn in question the validity of such Initiative Measure, on the ground that the same was repugnant to the Constitution of the United States of America, and such judgment was in favor of its validity, notwithstanding your petitioner's continued contention that such Initiative Measure violates the provisions of the Constitution of the United States hereinbefore referred to and relied upon by your petitioner. Upon such appeal to the Supreme Court of the State of North Dakota from such judgment, and on the 3rd day of November, 1944, said Court delivered and filed its opinion and final judgment in such cause, and affirmed the judgment of the District Court aforesaid, holding that such Initiative Measure was lawful and consistent with the Constitution of the United States. The substance of the holding of the Supreme Court of the State of North Dakota was that such appeal from such judgment was a sequel to the former appeal involving the order sustaining the demurrer to petitioner's amended Complaint, which decision on the former

appeal is reported in 72 N. D. 359, 7 N. W. (2d) 438. The Court further held and adjudicated that the application of the provisions of such Initiative Measure to the petitioner and said real estate owned by it in North Dakota, did not operate to infringe upon or deny to the plaintiff any rights guaranteed to it by the Constitution of the United States of America heretofore referred to and relied upon by the petitioner. That by the aforesaid final judgment of the Supreme Court of North Dakota, such Court further directed the District Court of Cass County, North Dakota, to affirm its said judgment, and that the Supreme Court of the State of North Dakota is the highest court of such state in which a decision in this suit can be had.

12. That therefore in accordance with Section 237 (a) of the Judicial Code (also cited as Title 28 USCA Sec. 344), and in accordance with the rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under such statute and legislation then in force, a review could be had [fol. 30] in the Supreme Court of the United States on a writ of error as a matter of right.

Wherefore Your petitioner prays for the allowance of an appeal from the said Supreme Court of the State of North Dakota, the highest court of said state in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the final decision and judgment of said Supreme Court of North Dakota may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of North Dakota, under the hand and the seal of said Court, may be sent to the Supreme Court of the United States as provided by law, and that an order be had touching the security to be required of the petitioner, and that the cost bond herewith tendered by the petitioner be approved.

Dated this 9th day of January, 1945.

Paul J. Thompson, Abbott L. Fletcher, Office and postoffice address: 600-612 Midland Bank Bldg., Minneapolis, Minn. Herbert G. Nilles, L. H. Oehlert, John J. Nilles, Office and postoffice address: 504 Black Building, Fargo, North Dakota. Attorneys for petitioner.

[fol. 31] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

Comes now Asbury Hospital, a corporation, the petitioner and appellant herein, in support of its Petition for Appeal herein, and assigns the following errors in the records and proceedings herein as grounds for reversal of the final decision and judgment of the Supreme Court of North Dakota:

I

That the Supreme Court of North Dakota erred in said decision and final judgment by holding that the Initiative Measure entitled "An Act Prohibiting Corporation Farming and Relating to Corporations Acquiring and Holding Real Estate Not Necessary in the Operation of Their Business", found cited in the North Dakota Session Laws for 1933 at pp. 494 and 495, and as amended by Chapter 89 of the North Dakota Session Laws for 1933, and as further amended by Chapter 111 of the North Dakota Session Laws for 1935, is not repugnant to and does not operate to infringe upon or deny to the appellant the rights guaranteed to it by Section 1 of the Fourteenth Amendment, Article 1 Section 10, Article 4 Section 2 of the Constitution of the United States.

II

That the Supreme Court of North Dakota erred in said final decision and judgment by holding that said Initiative Measure may be constitutionally applied to the real estate acquired by the appellant before the adoption of said Initiative Measure regardless of the constitutional provisions of the United States as aforesaid.

[fol. 32]

III

That the Supreme Court of North Dakota erred in said final decision and judgment by holding that the enforcement of such Initiative Measure against the appellant would neither deprive the appellant of its property without due process of law, nor deny to it the equal protection of the law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

IV

That the Supreme Court of North Dakota erred in said final decision and judgment by holding that such Initiative Measure does not impair the obligation of contract between such state and the appellant, or impair or divest any property right of the appellant within the meaning of the Fourteenth Amendment and of Article 1 Section 10 of the Constitution of the United States.

V

That the Supreme Court of North Dakota erred in said final decision and judgment by holding that the appellant was not within the jurisdiction of the State of North Dakota within the meaning of the Fourteenth Amendment to the Constitution of the United States, and erred in further holding that the appellant is not a citizen within the meaning of Article 4 Section 2 of the Constitution of the United States.

VI

That the Supreme Court of North Dakota erred in said final decision and judgment by holding that said Initiative Measure and its application to the appellant is not in contravention of any of such provisions of the Constitution of the United States, as set forth in the amended Complaint herein, and that the Supreme Court of North Dakota further erred in refusing the injunctive relief prayed for in said Complaint.

Wherefore on account of the errors hereinbefore assigned, petitioner prays that said final decision and judgment of the Supreme Court of North Dakota, dated November 3rd, 1944, in the above entitled cause, be reversed and judgment entered in favor of this appellant as prayed for in its amended Complaint herein.

[fol. 33] Dated this 9th day of January, 1945.

Paul J. Thompson, Abbott L. Fletcher, Office and postoffice address: 600-612 Midland Bank Bldg., Minneapolis, Minn. Herbert G. Nilles, L. H. Oehlert, John J. Nilles, Office and post office address: 504 Black Bldg., Fargo, N. Dak. Attorneys for Petitioner.

[fols. 34-45] IN THE SUPREME COURT OF NORTH DAKOTA

Reported in 72 N. D. 359, 7 N. W. (2d) 438

ASBURY HOSPITAL, a Corporation, Plaintiff and Appellant

vs.

CASS COUNTY, NORTH DAKOTA, a public corporation; R. F. Croal, as State's Attorney of Cass County, North Dakota, and his successors in office; and Alvin C. Strutz, as Attorney General of the State of North Dakota, and his successors in office, Defendants and Respondents.

1. The Declaratory Judgments Act (Supp. 1925, Sections 7712a-7712a16) is intended to provide a method whereby parties to a justiciable controversy may have the same determined by a court in advance of any invasion of rights or breach of obligation. But no action or proceeding lies under the Declaratory Judgments Act to obtain a decision which is merely advisory, or which determines only abstract questions. The action or proceeding must involve an actual controversy of a justiciable character between parties having adverse interests.

2. In the instant case it is *held*, for reasons stated in the opinion, that a controversy as to whether a statute which requires corporations to dispose of certain rural real estate within a prescribed period is applicable to the plaintiff and to certain real estate owned by it, is one properly determinable under the Declaratory Judgments Act.

3. Where the language of a statute is clear, certain, and unambiguous, the courts have only the simple and obvious duty to give effect to the intention which the legislature has thus expressed.

4. Initiative Measure, adopted June 29, 1929 (Laws 1933, pp. 494, 495), as amended by Laws 1933, Chap. 89, and Laws 1935, Chap. 111, which provides that "all corporations, both domestic and foreign, who now own or hold rural real estate, used or usable, for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall [fol. 46] dispose of the same within ten years from the date that this Act takes effect," and that in case any corporation fails within the time fixed to dispose of such real estate, then "title to such real estate shall escheat to the county in

which such real estate is situated upon an action instituted by the state's attorney of such county," does not mean that corporations are required to dispose only of real estate that had been acquired, and was being held, ultra vires.

5. Such Initiative Measure, as amended, does not ipso facto effect an escheat if a corporation fails to dispose of real estate within the prescribed period. The holding of real estate, which the statute requires a corporation to dispose of, beyond the prescribed period, constitutes a basis for an action to effect escheat; but the corporation continues to own and hold the real estate until title is divested by judgment rendered in the action brought to effect the escheat.

6. A corporation can have no legal existence beyond the bounds of the state which created it; and, though it may act in another state, it cannot do so as a legal or constitutional right but only by the comity and consent of such state.

7. Subject to the constitutional limitations that a state cannot exclude a corporation engaged in interstate commerce, or a corporation that is an agency or instrumentality of the Federal Government, a state may prohibit foreign corporations from doing business therein, or it may make the right to do business depend on such terms and conditions as in its discretion it may see fit to impose.

8. A foreign corporation which does business or carries on any activity in a state through comity or acquiescence, or under a license given without valuable consideration, does not have a contract binding the state not to restrict the activities of the corporation in, or to exclude it from, the state.

9. A state may prohibit all foreign corporations, which it might exclude from the state, from acquiring real estate therein for any purpose. The state, also, has the power to require all foreign corporations, which it might exclude from the state, to dispose of all real estate not reasonably [fol. 47] necessary in the conduct of their business, provided it affords such corporations a reasonable time in which to dispose of such real estate.

10. For reasons stated in the opinion, it is *held*, that the requirement of the statute that corporations dispose of real

estate of the character described in the statute, which the corporations owned when the statute became effective, within ten years thereafter, did not, nor did the procedure prescribed by the statute, operate to deprive the plaintiff of property without due process.

11. The justice, wisdom, necessity, utility and expediency of legislation are questions for legislative, and not for, judicial determination.

12. The "equality-of-the laws" clause of the 14th Amendment to the Constitution of the United States, and the "uniformity of operation" requirement of Section 11 of the state Constitution do not forbid classification.

13. Classification is primarily for the legislature; and in determining the validity of legislative classification, judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it is so lacking in any reasonable basis as to be arbitrary.

14. There are such distinctions between general corporations and co-operative corporations as to justify classification, and different treatment as to each of such classes.

15. One may attack the constitutionality of a statute only when and so far as it is being, or is about to be, applied to his disadvantage; and to raise the constitutional question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right.

16. A corporation is not a citizen within the meaning of the provisions of the Constitution of the United States (Art. 4, Section 2, and Section 1, Fourteenth Amendment) as to privileges and immunities of citizens.

(Syllabus by the Court)

[fol. 48] Appeal from the District Court of Cass County, Swenson, J.

Action for a declaratory judgment by Asbury Hospital, a corporation, against Cass County, R. F. Croal, as State's Attorney of Cass County, and his successors in office, and Alvin C. Strutz, as Attorney General, and his successors in office, to secure a judicial declaration that certain real property owned by the plaintiff in Cass County is not sub-

ject to the provisions of an initiative measure, adopted June 29, 1932, entitled "An Act prohibiting corporation farming and relating to corporations acquiring and holding real estate not necessary in the operation of their business."

From an order sustaining a demurrer to the complaint, the plaintiff appeals.

Affirmed.

Nilles, Oehlert & Nilles (Abbott L. Fletcher, of counsel), for appellant.

Alvin C. Strutz, Attorney General, Wm. R. Pearce, Assistant Attorney General, and Ralph F. Croal, State's Attorney, for respondents.

Traynor & Traynor, Sinnes & Duffy, Burnett, Bergesen & Haakenstad, C. L. Young, R. G. Beede and Karl Baldwin, amici curiae.

OPINION—Filed January 2, 1943. Modified January 25, 1943

Christianson, J. Plaintiff brought this suit in the district court of Cass County, under the Uniform Declaratory Judgments Act of this state (chap. 237, Laws 1923, Supp. 1925, Sections 7712a1-7712a16) to secure a judicial declaration that certain real property owned by the plaintiff is not subject to the provisions of an initiative measure, adopted June 29th, 1932, entitled "An Act prohibiting corporation farming and relating to corporations acquiring and holding real estate not necessary in the operation of their business" (Laws 1933, pp. 494, 495), and amended by chap. 89, Laws 1933, and chap. 111, Laws 1935. The Initiative Measure as amended by chap. 89, Laws 1933, reads as follows:

> "That all corporations, both domestic and foreign, except as otherwise provided in this Act, are hereby prohibited from engaging in the business of farming or agriculture." Section 1, Chap. 89, Laws 1933,
> [fol. 49] "That all corporations, both domestic and foreign, who now own or hold rural real estate, used or usable, for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall dispose of the same within ten years from the date that this Act takes effect, provided that during said ten year period said corporations may farm and use said real estate for agricultural purposes provided further that the ten year limitation provided by this Section shall be deemed a covenant running with the

title to the land against any grantee, successor of (or) assignee of such corporation, which is also a corporation." Section 2, Chap. 89, Laws 1933.

"That any corporation, either domestic or foreign, that acquires any rural real estate, used or usable, for farming or agriculture, by judicial process or operation of law, hereafter, except such as is reasonably necessary in the conduct of its business, shall dispose of such real estate within ten years from the date that it is so acquired, provided that during said ten year period it may farm and use the same for agricultural purposes, provided further that the ten year limitation provided by this Section shall be deemed a covenant, running with the title to the land against any grantee, successor of (or) assignee of such corporation, which is also a corporation." Section 3, Chap. 89, Laws 1933.

"That the title and ownership of any real estate acquired, in any manner, by any domestic or foreign corporation, since the approval and adoption of the aforesaid initiated law, is hereby declared to be legal and valid for all purposes, notwithstanding any provisions in said initiated law contained, but subject however, to all of the provisions now contained in said initiated law as hereby amended and reenacted." Section 4, Chap. 89, Laws 1933.

"That nothing in this Act shall be construed to prohibit co-operative corporations, seventy-five per cent of whose members or stockholders are actual farmers, residing in (on) farms or depending principally on farming for their livelihood, from acquiring real estate and [fol. 50] engaging in co-operative farming or agriculture." Section 4, Initiated Measure, Laws 1933, pp. 494, 495.

"That in case any corporation, either domestic or foreign, violates any provisions of this Act and fails within the time fixed by this Act to dispose of any real estate after it has acquired title to same, which is not reasonably necessary for the conduct of its business, then title to such real estate shall escheat to the county in which such real estate is situated upon an action instituted by the State's Attorney of such county, and such county shall within one year dispose of same

at public auction to the highest bidder, and the proceeds of such sale, after all expenses of such procedure shall have been paid, shall be paid to the corporation that formerly owned the same." (Section 5, Initiated Measure, Laws 1933, pp. 494, 495.

The statute was amended by the legislative assembly in 1935 (Laws 1935, Chap. 111) but the provision amended and the Amendment are not involved here.

The plaintiff in its complaint alleges that it is a nonprofit corporation, with perpetual existence, organized under the laws of the state of Minnesota; "that it is a corporation of, and subject to the discipline of the Methodist Episcopal Church and is created and exists for religious and charitable purposes solely; that under the laws of the State of Minnesota said corporation has the power to sue in any court and to acquire by purchase or otherwise, hold, enjoy, improve, lease, encumber and convey real and personal property;" that prior to 1925 the plaintiff became the owner of a certain real estate mortgage upon a quarter section of land in Cass county, in this state; that on November 27th, 1925, it became the owner of the real property covered by such mortgage, the same having been conveyed to it by the owner in liquidation and satisfaction of the indebtedness secured by the mortgage; that the plaintiff still is the owner in fee simple of such real property; "that the said real property is farming land used and usable for farming and agriculture;" that plaintiff is not engaged in the business of farming and agriculture, but that since the date of acquisition of such property the same has been farmed, by [fol. 51] individuals who are residents of North Dakota, under various farm lease contracts; that on the date the said real estate mortgage was acquired by the plaintiff, and on the date that it acquired title to, and ownership of said real property, plaintiff had the right and power, under its articles of incorporation and the laws of Minnesota, to be and become the owner of such mortgage and of said real property; "that at the time and on the date that plaintiff became the owner of said mortgage and of said real estate, there existed in North Dakota no law or statute restricting or forbidding plaintiff's ownership of said mortgage or of said real estate, and that when said mortgage and said real estate were acquired by the plaintiff, plaintiff had the right under the laws of the state of North

Dakota as they then existed, to be and become the full, unrestricted and unconditional owner of said mortgage and of said real estate, and to acquire a full, complete, and indefeasible title in and to said property."

The complaint further sets forth the legislative enactments, quoted above, and alleges that the defendant Cass county, the defendant Croal, the duly elected state's attorney of said county, and the defendant Strutz, the duly elected and acting attorney general of the state of North Dakota, unless restrained and enjoined from so doing will enforce such laws and will commence action to the end that the title to such real property shall escheat to the county immediately following July 29th, 1942, in accordance with the provisions of the said initiated measure.

It is further alleged that the plaintiff, since the year 1930, has constantly attempted to sell the real property in question but that it has been unable to sell the same for the amount of the mortgage originally on it, and that it will be unable to sell the land prior to July 29th, 1942; that any sale which plaintiff might be able to make would be substantially below the amount of money plaintiff has invested therein and that any sale of the property that might be made by the county pursuant to proceedings had under the above mentioned legislative enactments would be for less than the amount of the mortgage and that the cost and expense of such action and of such sale would result in [fol. 52] further decreasing any amount that might be received upon sale. It is also alleged "that said real estate above described is not necessary for the conduct of the plaintiff's business, excepting in the following respects: Plaintiff is permitted by the laws of the State of Minnesota to make investments of funds not immediately required for its operations and the ownership of said mortgage or mortgages and the subsequent acquisition of title to the lands covered by said mortgages, represents a legal and lawful function and exercise of one of the powers of the plaintiffs as a corporation; that the holding of such surplus funds in such investments is a legal and lawful function and power of plaintiff as a corporation and such investments constitute a part of the conduct of its business."

It is further alleged that application and enforcement of said legislative enactments as against the plaintiff and its said real property, would be violative of rights guaranteed to the plaintiff by Section 10 of Article 1, Section 2 of

Article 4 of the Constitution of the United States, by Section 1 of Article 14 of the Amendments thereto, and by their counterparts (Sections 11, 13, 16 and 20) in the Constitution of North Dakota.

It is further alleged that an actual controversy exists between the plaintiff and the defendants as to the applicability of said legislative enactments to the plaintiff and its said real property and as to whether such legislation, if applicable, is violative of the constitutional rights of the plaintiff under the above mentioned constitutional provisions.

Judgment is asked that the said legislative enactments be adjudged to be not applicable to plaintiff or its said land, or to any farm lands that were acquired prior to July 29th, 1932, the effective date of such legislation, or to any lands that were acquired subsequent to that date upon the foreclosure of liens or mortgages that were legally effective prior to that date; that if the court adjudge and declare that such legislation is applicable to the plaintiff and to its property so acquired prior to the enactment of such legislation, that in that event the court adjudge that such legislatoin is unconstitutional and unenforceable, and that the ap- [fol. 53] propriate judgment be entered to prevent the defendants from instituting any action or proceeding against the defendant under the aforesaid legislative enactments.

The defendants interposed a general demurrer. The court sustained the demurrer. In its order the court ruled that "the subject matter of this action and the facts set forth" in the complaint constitute a proper action for a declaratory judgment, but that such facts do not constitute a cause of action so as to entitle plaintiff to any relief against the application and enforcement of the statute against the plaintiff and its land. The order was accompanied by a memorandum opinion wherein the court considered at some length the various contentions advanced by the plaintiff and held: that the statute in question is applicable to the plaintiff corporation and the tract of land described in the complaint; and that the statute is not violative of any of the constitutional provisions invoked by the plaintiff. Plaintiff appeals from the order sustaining the demurrer.

The defendants did not attack the sufficiency of the complaint on the ground that it did not show a controversy properly determinable under the Declaratory Judgments

Act. On the contrary, defendants concede that there existed, and still exists an actual present justiciable controversy between the parties to this action—a controversy involving important and valuable rights affecting the ownership of property belonging to the plaintiff, and that such controversy is properly determinable under the Declaratory Judgments Act. The demurrer was apparently intended to challenge only the validity of the claims of the plaintiff on the merits of the controversy, namely, the claims of the plaintiff that the provisions of the challenged statute were inapplicable to plaintiff and its real property: First, because the plaintiff and its property were not within the terms of the statute; and, second, that if they were within the terms of the statute that then the statute would be, and is, unconstitutional and void.

The Declaratory Judgments Act provides that courts of record in this State "shall have power to declare rights, status, and other legal relations whether or not further re- [fol. 54] lief is or could be claimed;" and that "no action or proceeding shall be open to objection on the grounds that a declaratory judgment or decree is prayed for." Supp. 1925, Section 7712a1. It applies to persons "whose rights, status or other legal relations are affected by a statute," and provides that they "may have determined any question of construction * * * arising under the * * * statute * * * and obtain a declaration of rights, status or other legal relation thereunder." Supp. 1925 Section 7712a2. The Act requires that "when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration" (Supp. 1925, Section 7712a11), and that "all orders, judgments, and decrees under this act may be reviewed as other orders, judgments, and decrees" (Supp. 1925, Section 7712a7). The Act "is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." Supp. 1925, Section 7712a12.

The Act is intended to provide a method whereby parties to a justiciable controversy may have such controversy determined by a court in advance of any invasion of rights, or breach of obligation. Nashville, C. & St. L. R. Co. vs. Wallace, 288 US 249, 77 L. Ed. 730, 53 S. Ct. 345, 87 ALR 1191; Currin vs. Wallace, 306 U. S. 1, 83 L. Ed. 441, 59 S.

Ct. 379; Kariher's Petition, 284 Pa. 455, 131 A. 265; Borchard, Declaratory Judgments, 2d ed., pp. 280 et seq.; Thompson vs. Chilton Co., 236 Ala. 142, 181 So. 701; Green vs. Inter-Ocean Casualty Co., 203 N. C. 767, 167 S. E. 38; Sigal vs. Wise, 114 Conn. 297, 158 A 891, 893; Miller vs. Currie, 208 Wis. 199, 242 N. W. 570, 572. "It is intended to relieve litigants of the rule that no rights may be judicially adjudged until a right has been violated (American Nat. Bank & T. Co. vs. Kushner, 162 Va. 378, 174 S. E. 777) and to authorize judicial action in actual controversies where such action formerly was not available. Holly Sugar Corp. vs. Fritzler, 42 Wyo. 446, 296 P. 206. But an action or proceeding for a declaratory judgment must involve an actual controversy of a justiciable character, between parties having adverse interests. No action or proceeding lies [fol. 55] under the Delaratory Judgments Act to obtain a decision which is merely advisory, or which merely determines abstract questions." Langer vs. State, 69 N. D. 129, 141, 284 N. W. 238.

In this case there is an actual controversy of a justiciable character between parties having adverse interests. The question in dispute is not abstract and remote, but real and present. The statute has been in existence for more than nine years. The defendants claim that if plaintiff retains ownership of this property until after July 29th, the property will be subject to the provisions of the statute, and may be sold at public auction pursuant to proceedings had under the statute. The defendants assert that they will institute the action prescribed by the statute to bring this about. The plaintiff claims that the statute cannot be constitutionally applied to such real property, and that it may continue to hold ownership thereof without being subject to the proceedings prescribed by the statute. The uncertainty of plaintiff's tenure naturally will interfere with the operation and especially with the leasing, of the property now. Pierce vs Society of Sisters, 268 US 510, 69 L. Ed. 1070, 45 S. Ct. 571, 39 ALR 468; Euclid vs Ambler Realty Co. 272 US 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 ALR 1016. The trial court was correct in holding that there is presented a cause for determination under the Declaratory Judgments Act. Borchard, Declaratory Judgments, 2d ed, pp. 43, 62, 177, 786, 927, 930, 931, 984, 986. See also Pierce vs Society of Sisters, and Euclid vs Amber Realty Co. supra; Nashville, C. & St. L. R. Co. vs Wallace, supra;

Acme Finance Co. vs Huse, 192 Wash. 96, 73 P. (2d) 341, 114 A.L. R. 1344, and note at pages 1361 et seq.

The plaintiff contends:

(1) That the statute in question here should be construed as applicable only to lands purchased or acquired upon foreclosure of mortgages that were executed, subsequent to the enactment of the statute; that it should be construed as having no application to lands acquired upon the foreclosure or in liquidation of mortgages executed prior to July 29th, 1932, the effective date of the statute.

[fol. 56] (2) That the provision in the statute that land must be disposed of within ten years from the date it was acquired does not apply to a corporation, like the plaintiff, that has authority to acquire, hold and sell real property, or invest its funds in real estate mortgages; that in such case the holding of lands so acquired is necessary in the conduct of the business of the corporation within the purview of the statute.

(3) That if the statute is construed as applicable to the plaintiff and the land in question here, then the statute is unconstitutional because it operates, (a) to impair the obligations of a contract; (b) To deprive plaintiff of vested property rights without due process of law; and (c) it discriminates arbitrarily between two classes of corporations by relieving co-operative corporations, having a membership of a certain class, from the inhibitions placed on other corporations, and that, as a consequence, it confers upon such cooperative corporations privileges that are not granted to others, in violation of Section 20 of the Constitution of this state, and denies to the plaintiff privileges conferred upon co-operative corporations, in violation of Section 20 of the Constitution of this state and of Section 2, Article 4 of the Constitution of the United States; and also denies to plaintiff the equal protection of the laws, in violation of Section 1, Article 14, of the amendments to the Constitution of the United States, and of Section 11 of the Constitution of North Dakota.

These contentions will be considered in the order stated:

(1) The contention that the statute should be construed as not applicable to real property that was acquired prior to July 29th, 1932, or to real property that has been ac-

quired pursuant to the foreclosure of a mortgage that was executed prior to July 29th, 1932, is directly contrary to the language of the statute. It will be noted that Section 2 of the statute, as quoted above, relates to property owned or held by a corporation at the time the statute became effective, and Section 3 relates to real property that is acquired after the statute became effective. This action involves lands that were owned and held by the plaintiff cor- [fol. 57] poration at the time the statute became effective. Section 2 provides: "All corporations, both domestic and foreign, *who now own or hold* rural real estate, used or usable, for farming or agriculture, except such as is reasonably necessary in the conduct of their business shall dispose of the same within ten years from the date that this act takes effect." This language is plain—it requires no construction. This provision was contained in the initiative measure which became effective July 29th, 1932, and retained in the amendatory act enacted by the Legislative Assembly in 1933.

"The legislature must be understood to mean what it has plainly expressed, and this excludes construction. The legislative intent being plainly expressed, so that the act read by itself, or in connection with other statutes pertaining to the same subject, is clear, certain, and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms." 2 Lewis's Sutherland, Stat. Constr. 2d ed. p. 701; State vs. Rother, 56 N. D. 875, 219 N. W. 574. See also Madden vs. Dunbar, 52 N. D. 65, 201 N. W. 988.

(2) The contention that inasmuch as the plaintiff was authorized under its articles of incorporation to acquire and hold real property, the plaintiff and the land in question here fall within the exception in the statute, which authorizes corporations to continue to hold such real estate "as is reasonably necessary in the conduct of their business" is likewise untenable. This contention sums to this: That the requirement that a corporation dispose of the rural real estate owned by it, used or usable for farming or agriculture, within ten years from the effective date of the Act, does not apply to any real property that was owned by a corporation that had authority under the articles of incorporation to own and hold real property. In other words—according to the contention of the plaintiff the

statute would apply only in cases where the owning and holding of real property were ultra vires. The statute is not predicated upon the proposition that the real estate that a corporation is required to dispose of was acquired or is held by the corporation in excess of its charter powers. The statute presupposes that the real estate has been lawfully acquired and is lawfully owned by the corporation. [fol. 58] Where a corporation, on the date the statute became effective, owned and held real estate of the character specified in the statute, it is required to dispose of the same within ten years from that date, excepting alone such real estate "as is reasonably necessary in the conduct" of its business. Corporations are organized for the purpose of carrying on and conducting certain specified business or activity. They are granted certain powers to be used to perform the functions for which they are organized. There is an obvious distinction between the objects or business which a corporation is organized to accomplish or conduct and the powers with which it is vested for the purpose of conducting the business or attaining its objects. When the statute provides that there shall be excepted from its operation such real estate "as is reasonably necessary in the conduct of" the business of a corporation, it means such real estate as is reasonably necessary for carrying on the business or activity which the corporation was created to carry on. 6 Fletcher, Cyc. Corp. pp. 170, 171, Section 2475; 17 Fletcher, Cyc. Corp. pp. 471-474; General Conference vs. Berkey, 156 Cal. 466, 105 P. 411; Major Creek Lumber Co. vs. Johnson, 99 Or. 172, 195 P. 177; Alpena Portland Cement Co. vs. Jenkins & R. Co. 244 Ill. 354, 91 N. E. 480; Friedlander Bros. vs. Deal, 218 Ala. 245, 118 So. 508.

In order for a foreign corporation to be "doing business" or "transacting business" in a state—(within the purview of laws imposing conditions on its right to do business in such state)—"there must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created and not merely what the corporation might have authority to do. A distinction, in other words, is to be observed in this connection between the purposes of a corporation and its powers. So the doing of an act which, though within the power of the corporation, is not a part of the business which it was authorized to con-

duct, is not doing business." 17 Fletcher, Cyc. Corp. pp. 471-474.

In General Conference vs. Berkey, 156 Cal. 486, 105 P. 411, supra, the supreme court of California had occasion to consider a question quite similar to the one under consideration here. The General Conference of Free Baptists was a foreign corporation organized under the laws of Maine. It owned a lot in the city of Sacramento. It sold [fol. 59] the lot. The question rose whether the sale of this lot constituted "transacting business" or "doing business" by the General Conference of Free Baptists in the state of California. In the decision in the case, the court said:

> "It remains to be considered, then, whether a sale of real estate by such a corporation is a transaction of business by it within the meaning of the constitutional provision above referred to. The phrase 'to transact business,' as used in this provision, is equivalent to the words 'to do business,' found in the statutes of many states, prohibiting a foreign corporation from 'doing business' in such states until it has filed a certificate designating a place of business and a resident agent, upon whom process may be served, or complied with other conditions. * * * "This corporation was certainly not engaged in the business of buying and selling land. As we have said, in another connection, its charter plainly indicates that the power conferred upon it to make such purchase and sale was not granted for the purpose of enabling it to do such acts as a means of making a profit thereon. The buying and selling permitted to it were merely incidental to the carrying on of the main purposes of the corporation. A distinction is to be drawn between the purposes of a corporation and its powers (Floyd vs. Perrin, 30 S. C. 1, 12, 8 S. E. 14, 2 LRA 242). The purposes of the plaintiff, as defined in the articles of incorporation, are 'religious, missionary, educational and charitable.' As incidental to these purposes, it is granted a variety of powers, i. e., the power to prosecute and defend suits at law, the power to use a common seal, the power to take and hold for the objects of said corporation any real or personal property, and the power to sell and convey any estate which the interests of the corporation may require to be sold and con.. yed. All of these powers

> are to be exercised in subordination to the main purposes as first declared. The purchase and sale of property by such a corporation is not one of the ends for which it is organized, but is merely a means to enable it to accomplish those ends. Property is to be acquired only for the objects of the corporation, and to [fol. 60] be sold only when the interests of the corporation require such sale. The power to sell property by a corporation of this character is as purely incidental to the prosecution of its main purposes as are the other powers enumerated in the charter, as, for example, the power to prosecute and defend suits at law. It is quite generally held that the mere prosecuting or defending of suits by a foreign corporation is not 'doing business,' within the meaning of statutes of the kind we have been discussing."

The language and reasoning of the California court seem quite applicable here.

According to the allegations of the complaint, the plaintiff was incorporated under the laws of the state of Minnesota, and under the laws of that state it "has the power to sue in any court and to acquire by purchase or otherwise, hold, enjoy, improve, lease, encumber and convey real and personal property." Under the laws of Minnesota, and the articles of incorporation it "is a corporation of, and subject to the discipline of the Methodist Episcopal Church and is created and exists for religious and charitable purposes solely." The exact business or activity it was created to conduct does not appear, except insofar as this may be inferred from its name, namely,—that it is a hospital. But the "plaintiff is not engaged in the business of farming and agriculture." The real estate which it owns "is farming land used and usable for farming and agriculture," and "since the date of the acquisition of said property by plaintiff the same has been farmed by individuals who are residents of North Dakota, under the terms of various and sundry farm lease contracts upon the usual terms which prevail in the community in which said land is situated." The "said real estate is not necessary for the conduct of the plaintiff's business," except as the investment by the plaintiff of its surplus funds in real-estate mortgages, and the subsequent acquisition of lands covered by such mortgages

constitute lawful exercise of the corporate powers of the plaintiff, and is a part of the conduct of its business.

The bringing of suits, and the ownership of a tract of rural real estate in this state, rented to individuals "upon [fol. 61] the usual terms which prevail in this community in which said land is situated" can hardly be said to constitute solely "religious and charitable" works. The bringing of suits, and the investment of funds (to be utilized in carrying on the religious and charitable work the corporation was created to perform) are but means which the corporation may employ to enable it to do the religious and charitable work for which it was created; but they do not constitute the business or activity which the corporation was created to carry on.

We are agreed that the statute in question here is applicable to the plaintiff and that plaintiff holds the tract of land which it acquired in November, 1925, subject to the provisions thereof. The question thereof presents itself whether the statute as so applied is violative of rights guaranteed to the plaintiff by the provisions of the state and Federal Constitutions which it has invoked. The contention of the plaintiff that the statute, if applied to it and to the tract of land in question, operates to impair the obligations of a contract, to impair plaintiff's vested rights and to deprive it of property without due process of law, are predicated upon the proposition that at the time the plaintiff became the owner of the land it had a right to acquire the same and there was no such restriction upon its right of ownership, tenure or use, as are prescribed by the challenged statute; and that plaintiff has acquired a vested right to continue to own and enjoy such land in the same manner and to the same extent as was authorized by the laws in force at the time it acquired the land.

A corporation may be created only by authority of the sovereign power. 13 Am. Jur. 175, 234, 18 CJS p. 404. "Corporations are the creations of the state endowed with such faculties as the state bestows and subject to such conditions as the state imposes." 13 Am. Jur. 234. "A corporation can have no legal existence beyond the bounds of the state or sovereignty which created it, and although it may act in another state or country, it cannot do so as a legal or constitutional right but only by the comity and consent of such state or country." 20 CJS p. 12. The Constitution of this State provides that "no charter of incor-

[fol. 62] poration shall be granted, changed or amended by special law, except in the case of such municipal, charitable, educational, penal or reformatory corporations as may be under the control of the state;" but that "the Legislative Assembly shall provide by general laws for the organization of all corporations hereafter to be created and that any such law so passed shall be subject to future repeal or alteration," and that "no foreign corporation shall do business in this State without having one or more places of business and an authorized agent or agents in the same upon whom process may be served." N. D. Const. Sections 131 and 136.

Subject to the constitutional limitations that a State cannot exclude a corporation engaged in interstate commerce, or a corporation that is an agency or instrumentality of the Federal Government (23 Am. Jur. 211-214, 20 CJS pp. 32, 33), "a state may prohibit foreign corporations from doing business therein, or it may make the right to do business depend on such terms and conditions as it may in its discretion see fit to impose." 20 CJS p. 30; 23 Am. Jur. 224, Crescent Cotton Oil Co. vs. Mississippi, 257 US 129, 66 L. Ed. 166, 42 S. Ct. 42; see also Baltic Min. Co. vs. Massachusetts, 231 US 68, 58 L. Ed. 127, 34 S. Ct. 15; Cheney Bros. Co. vs. Massachusetts, 246 US 147, 62 L. Ed. 632, 38 S. Ct. 295; Underwod Typewriter Co. vs. Chamberlain, 254 US 113, 65 L. Ed. 165, 41 S. Ct. 45.

"The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta vs. Earle, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States [fol. 63] may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its busi-

ness to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." Paul vs. Virginia, 8 Wall. (75 US) 168, 181, 19 L. Ed. 357, 360; Atlantic Ref. Co. vs. Virginia, 302 US 22, 26, 82 L. Ed. 24, 28, 58 Ct. 75.

"A foreign corporation doing business in a State through comity or acquiescence, or under a license given without valuable consideration, has no contract binding the State not to exercise its powers to exclude it." 23 Am. Jur. 224, see also 20 CJS pp. 31 et seq.; 17 Fletcher, Cyc. Corp. pp. 797 et seq. In such case, the state may repeal at any time a statute granting permission to do such business, and may withdraw or revoke such license, and may withdraw its implied consent to a foreign corporation which has been allowed on principles of comity to engage in business therein without express permission and may evict such corporation, provided its action does not operate to deprive the corporation of its property without due process, obstruct or burden "interstate or foreign commerce, or impede business conducted by Federal authority." 23 Am. Jur. 224, 225; 17 Fletcher, Cyc. Corp. pp. 797, 798; 20 CJS pp. 31 et seq.; National Council vs. State Council, 203 US 151, 51 L. Ed. 132, 27 S. Ct. 46; Crescent Cotton Oil Co. vs. Mississippi, supra. Of course, where a foreign corporation is admitted to a State, not as a mere licensee, but upon terms and conditions which create a contract between the corporation and the state, the state may not impair the obligations of such contract. But, even where there may be said to be a contract between the state and a foreign corporation, the State may have reserved the power to alter the conditions on which the corporation is permitted to do business, or to revoke the right to do business in the State at all. 23 Am. Jur. 223.

The right capacity of a corporation to acquire and own real estate is frequently expressly limited. 6 Fletcher, Cyc. Corp. pp. 670-681.

[fol. 64] "Very often, too, there are provisions in the constitutions or statutes which directly or by necessary implication require surplus or unnecessary property to be disposed of by the corporation, within a fixed period of time such as five years, or six years, or ten years, or some other designated number of years." 6 Fletcher, Cyc. Corp. pp. 681, 682.

Some states, by constitutional or statutory provisions, have prohibited foreign corporations from acquiring and holding real property within their limits, or have restricted the right to acquire such property to the purchase thereof at a judicial sale for the purpose of collecting or enforcing a lien or judgment in favor of the corporation, 17 Fletcher, Cyc. Corp. pp. 173, 174; Com. ex rel. Atty. Gen. vs. New York, L. E. & W. R. Co., 114 Pa. 340, 7 A. 756; Wash. Const. Art. 2, Sec. 33; Ky. Const. Sec. 192; German Ins. Co. vs. Com., 141 Ky. 606, 133 S. W. 793; First Nat. Bank vs. Com., 143 Ky. 816, 137 S. W. 518; Com. vs. Clark County Nat. Bank, 187 Ky. 151, 219 S. W. 175; Okla. Const. Art. 22, Sec. 2; Okla. Sess. Laws 1907-1908, pp. 196, 197; State vs. Prairie Oil & Gas Co., 64 Okla. 267, 167 P. 756; Wolfe vs. State, 163 Okla. 180, 21 P. (2d) 1067; Neb. Comp. Stat. 1922, Sections 5687, 5690; Lord vs. Schultz, 115 Neb. 33, 211 N. W. 210, 489. See also S. D. Const. Sec. 7, Art. 17; State ex rel. Chamberlain vs. Hutterische Bruder Gemeinde, 46 S. D. 189, 191 N. W. 635; Groo vs. Norman & Robinson, 42 App. D. C. 387, 388, 389; Puerto Rico vs. Rubert Hermanos, Inc., 309 U. S. 543, 84 L. Ed. 916, 60 S. Ct. 699.

"Foreign corporations enter a state and transact business therein only with that state's consent, express or implied. It may exclude them entirely, or impose whatever restrictions or conditions it sees fit, provided in so doing it does not violate any provisions of the Federal Constitution or laws. Particularly is this true with reference to real property rights and transactions. For each state has the power, uncontrolled by another, to establish rules regulating the tenure of lands lying within its limits, and the manner of buying and selling them by persons and corporations under its jurisdiction. And a state may, by statute, expressly prohibit foreign corporations from acquiring and holding real property within its limits, or impose such conditions [fol. 65] and restrictions upon the right as it may see fit." 17 Fletcher, Cyc. Corp. pp. 173, 174; Munday vs. Wisconsin, 252 U. S. 499, 64 L. Ed. 684, 40 S. Ct. 365.

Where interstate commerce is not directly affected, a state has the power to exclude all foreign corporations, except such as are agencies or instrumentalities of the Federal Government (Phillips Petroleum Co. vs. Jenkins, 297 U. S. 629, 634, 80 L. Ed. 943, 947, 56 S. Ct. 611); and a state has the power to prohibit any foreign corporation, which it might exclude from the state, from acquiring real

property in the state for any purpose (17 Fletcher, Cyc. Corp. 173, 174), even through conveyances executed and delivered in another state. Munday vs. Wisconsin, supra. The state might have refrained from enacting laws providing for organization of corporations for any purpose (Phillips Petroleum Co. vs. Jenkins, 297 U. S. at p. 634, 80 L. Ed. at p. 947, 56 S. Ct. 611) or having enacted laws providing for organization of corporations, it might later alter, suspend, or repeal such laws, provided, that in so doing the state observed the constitutional requirements of due process and equal protection of the law, and did not lay a burden upon, or interfere with, interstate commerce, or with corporate agencies or instrumentalities of the Federal Government. N. D. Const. Sec. 131; Comp. Laws 1913, Sec. 4495; Tomlinson vs. Jessup, 15 Wall. 82 (U. S.) 454, 21 L. Ed. 204; Greenwood vs Union Freight R. Co., 105 U. S. 13, 26 L. Ed. 961; Missouri P. R. Co. vs. Kansas, 216 U. S. 262, 54 L. Ed. 472, 30 S. Ct. 330; Calder vs. Michigan, 218 U. S. 591, 54 L. Ed. 1163, 31 S. Ct. 122; Polk vs. Mutual Reserve Fund Life Asso., 207 U. S. 310, 52 L. Ed. 222, 28 S. Ct. 65; International Bridge Co. vs. New York, 254 U. S. 126, 65 L. Ed. 176, 41 S. Ct. 56; Ft. Smith Light & Traction Co. vs. Board of Improvement, 274 U. S. 387, 71 L. Ed. 1112, 47 S. Ct. 595; Phillips Petroleum Co. vs. Jenkins, supra.

Where there is a reservation in the state Constitution of power to alter, suspend or repeal all laws, providing for organization of corporations—such as there is in the Constitution of this state—this reservation becomes a part of the charter of the corporation (6 Fletcher, Cyc. Corp. Sections 823-825), and it is beyond the power of the legislature [fol. 66] to confer upon corporations powers that are not subject to abrogation or change pursuant to the legislative power so reserved. Missouri P. R. Co. vs. Kansas, supra; Texas & N. O. R. Co. vs. Miller, 221 U. S. 408, 414, 55 L. Ed. 789, 795, 31 S. Ct. 534; Phillips Petroleum Co. vs. Jenkins, supra. Where there is a constitutional reservation of continued legislative power (such as in Sec. 131 of the Constitution of this state) the matter of the organization of corporations, and the powers to be granted to and exercised by them are subjects of general governmental policy which one legislative assembly may not bargain away or withdraw from the constitutional law-making function of a succeeding legislature. Missouri P. R. Co. vs. Kansas, supra, and Texas & N. O. R. Co. vs. Miller, supra. Obviously, permission or authorization to foreign corporations

to enter and do business in the state is no more withdrawn from legislative action than are the charters of domestic corporations. Connecticut Mut. L. Ins. Co. vs. Spratley, 172 U. S. 602, 620-622, 43 L. Ed. 569, 575, 576, 19 S. Ct. 308; Phillips Petroleum Co. vs. Jenkins, supra, 297 U. S. at page 635, 80 L. Ed. at page 948, 56 S. Ct. 611; Waters-Pierce Oil Co. vs. Texas, 177 U. S. at pages 43-47, 44 L. Ed. at pages 664, 665, 20 S. Ct. 518; 23 Am. Jur. 296-298.

The plaintiff had no express permission to acquire and hold real estate in the state. All activities incident to the acquisition of the real estate in question here and the use and enjoyment thereof were had as a matter of comity. "Comity is a matter of favor and not of right." A state "may by statute modify or withdraw such comity towards a corporation created by, or existing under the laws of another state or sovereign, provided the modification does not come in conflict with the paramount laws of the United States." 17 Fletcher, Cyc. Corp. Sec. 8333, pp. 131-135. It goes without saying that the plaintiff has no greater rights than if it had qualified under the laws relating to the admission of foreign corporations; and mere permission to carry on any activity or to acquire property within the state does not create a contract which will preclude the state from subsequently restricting the power of foreign corporations to acquire and hold real property, provided that [fol. 67] in making such restriction, the state does not deprive the corporation or its stockholders of property without due process or deny the equal protection of the laws. The permission to do business, whether express or implied, does not constitute a contract or create a vested right to continue to hold the property, without restrictions other than those which existed at the time it was required. Such permission constitutes a license which the state subsequently may abrogate or change, if in so doing there is no deprival of property without due process or denial of equal protection of the laws.

In considering the nature of an authorization by a state to a foreign corporation to do business, and the power of the state to alter or abrogate such authorization, in Connecticut Mut. L. Ins. Co. vs. Spratley, 172 U. S. 602, 43 L. Ed. 569, 19 S. Ct. 308, supra, the Supreme Court of the United States said:

"Instead of a contract, it was a mere license given by the state to a foreign corporation to do business within its

limits upon complying with the rules and regulations provided for by law. That law the state was entirely competent to change at any time by a subsequent statute without being amenable to the charge that such subsequent statute impaired the obligation of a contract between the state and the foreign corporation doing business within its borders under the former act.

"Statutes of this kind reflect and execute the general policy of the state upon matters of public interest, and each subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify the act granting such permission, making proper provision when necessary in regard to the rights of property of the company already acquired, and protecting such rights from any illegal interference or injury. Douglas vs. Kentucky, 168 U. S. 488, 42 L. Ed. 553, 18 S. Ct. 199. The cases showing the right of a state to grant or refuse permission to a foreign corporation of this kind to do business within its limits are collected in Hooper vs. California, 155 U. S. 648, at 652, 39 L. Ed. 297, at 299, 15 S. Ct. 207, 5 Inters. Com. Rep. 610.

[fol. 68] "Having the right to impose such terms as it may see fit upon a corporation of this kind as a condition upon which it will permit the corporation to do business within its borders, the state is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed itself of the right given by the state, but it may alter them at its pleasure. In all such cases there can be no contract springing from a compliance with the terms of the act, and no irrepealable law, because they are what is termed 'governmental subjects,' and hence within the category which permits the legislature of a state to legislate upon those subjects from time to time as the public interests may seem to it to require.

"As these statutes involve public interests, legislation regarding them are necessarily public laws, and as stated in Newton vs. Mahoning County, 100 U. S. 548, at 559, 25 L. Ed. 710, at 711:

"'Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality.

This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.'" Connecticut Mut. L. Ins. Co. vs. Spratley, 172 U. S. at pages 620-622, 43 L. Ed. pp. 575, 576, 19 S. Ct. 308.

As has been pointed out, there are constitutional or statutory provisions in many states restricting the right of corporations to acquire and hold real estate and requiring that such corporation dispose of real estate which they have acquired, within a fixed period of time.

No instance has been called to our attention, and none has been found, where such legislation was predicated upon the proposition that the State was without power to require a corporation to dispose of real property that it had acquired before the statute or constitutional provision became effective; and in some of the states, the legislation restricting the right of corporations to hold real property is specifically [fol. 69] made applicable as well to property that had been acquired before the legislation became effective as to property subsequently acquired. Okla. Const. Art. 22, Sec. 33, and Session Laws 1907-08, p. 197; Neb. Comp. Stat. 1922, Sections 5687, 5690; Ky. Const. Sec. 192; Com. vs. Clark County Nat. Bank, 187 Ky. 151, 219 S. W. 175. See also Puerto Rico vs. Rubert Hermanos, Inc. 309 U. S. 543, 84 L. Ed. 916, 60 S. Ct. 699; State vs. Prairie Oil & Gas Co. 64 Okla. 267, 167 P. 756; Wolfe vs. State, 163 Okla. 180, 21 P. (2d) 1067; State ex rel. Collins vs. Crescent Cotton Oil Co. 116 Miss. 398, 77 So. 185; Crescent Cotton Oil Co. vs. State, 121 Miss. 615, 83 So. 680; Crescent Cotton Oil Co. vs. Mississippi, 257 U. S. 129, 66 L. Ed. 166, 42 S. Ct. 42. In Com. vs. Clark County Nat. Bank, 187 Ky. 151, 219 S. W. 175, supra, it was contended that inasmuch as the land sought to be escheated had been acquired by the corporation before the adoption of the constitutional provision, "the corporation had a vested right which was unaffected by the adoption" of the new constitution containing the provision as "there could be no impairment of the obligation of contract or rights acquired or vested before the making of the law."

The court of appeals of Kentucky held that the constitutional provision and the statutes enacted pursuant thereto

were applicable to lands that had been acquired by a corporation prior to the adoption of the Constitution and the enactment of the statutes, and that the enforcement of such constitutional and statutory provisions against lands which a corporation had acquired prior to the adoption of the Constitution and enactment of the statute did not result in "unconstitutionally" impairing "the contract or vested rights" of the corporation.

We think it clearly follows from the principle announced by the Supreme Court of the United States in Connecticut Mut. L. Ins. Co. vs. Spratley, 172 U. S. 602, 43 L. Ed. 569, 19 S. Ct. 308 supra, and Phillips Petroleum Co. vs. Jenkins, 297 U. S. 629, 80 L. Ed. 943, 56 S. Ct. 611, supra, that the provisions of the statute in question here restricting the power of the plaintiff to hold real estate, used or usable for farming or agriculture, and requiring it to dispose of the same within ten years from the date the act took effect, do not impair the obligations of any contract between the State [fol. 70] and the plaintiff, or impair any vested property right of the plaintiff.

The question next presents itself whether such provisions operate to deprive the plaintiff corporation of its property without due process of law. This question must be answered in the negative. The state having the right to restrict the power of the plaintiff and corporations similarly situated as to the acquisition and ownership of real estate within the state, it naturally follows that any legislation which it might enact to carry such policy into effect must have a beginning, and "the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning." Sperry & H. Co. vs. Rhodes, 220 U. S. 502, 55 L. Ed. 561, 31 S. Ct. 490. Of course, the state could not put its new policy into effect in such sudden and arbitrary manner as to practically sacrifice and confiscate the interest of the corporation in the property that it had been permitted to acquire within the State. In making the change it must give the corporation reasonable time in which to dispose of its property. 17 Fletcher, Cyc. Corp. p. 799. See also State ex rel. Collins vs. Crescent Cotton Oil Co. 116 Miss. 398, 77 So. 185; Crescent Cotton Oil Co. vs. State, 121 Miss. 615, 83 So. 680; Crescent Cotton Oil Co. vs. Mississippi, 257 U. S. 129, 66 L. Ed. 166, 42 S. Ct. 42. The statute gives to corporations like the plaintiff, who held rural real estate at the time the statute became effective, ten years in which to dis-

pose of it before such property becomes subject to the provisions of the statute providing for disposal of the property under the procedure provided by the statute. Clearly the period of time provided by the statute cannot be said to be so unreasonable or arbitrary as to operate to deprive corporations holding land subject to the statute of property without due process of law. See State ex rel. Collins vs. Crescent Oil Co.; Crescent Oil Co. vs. State, and Crescent Oil Co. vs. Mississippi, all supra. Such period is considerably longer than that prescribed in analogous laws in other states. Thus, Oklahoma prescribes seven years, and Kentucky five years (Okla. Const. Art. 22, Sec. 33, and Session Laws 1907-08; Ky. Const. Sec. 192, Com. vs. Clark County Nat. Bank, 187 Ky. 151, 219 S. W. 175), and under the Oklahoma and Kentucky laws the corporation receives no part of the proceeds of the sale of lands escheated to the state, [fol. 71] but the lands and proceeds of sale thereof become the property of the state.

Appellant contends, however, that the economic depression which existed at the time the statute was enacted, and which continued thereafter, operated to depress the market value of lands in such degree as to render it practically impossible for corporations to dispose of their lands at anything like their actual value within the ten-year period, and that consequently the application of the statute will deprive the plaintiff and other corporations owners of land similarly situated of property without due process. The contention and the argument in support of it involve the wisdom and justice of the law; but do not show that the law is violative of the constitutional provisions upon which plaintiff relies. The validity of a statute must be determined solely by whether it is within the purview of legislative powers as limited by the Federal and state Constitutions. 11 Am. Jur. 803; 16 C. J. S. pp. 471 et seq.; State ex rel. Linde vs. Taylor, 33 N. D. 76, 156 N. W. 561, LRA1915B, 156. The justice, wisdom, necessity, utility or expediency of a law which is within their powers are for the lawmakers. 11 Am. Jur. 803, 804 et seq., 16 C. J. S. pp. 471 et seq.

A court has no power to declare a statute invalid on the ground of unjust and oppressive provisions, unless such provisions contravene the state or Federal Constitution. "The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial

cognizance." 1 Cooley, Const. Lim. 8th ed. p. 345. "The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the people themselves, or their legislative representatives." Lommen vs. Minnesota Gaslight Co. 65 Minn. 196, 208, 68 N. W. 53, 54. "The judiciary can only arrest the execution of a statute when it conflicts with the Constitution." 1 Cooley, Const. Lim. 8th ed., pp. 341, 345. See also Billings vs. Illinois, 188 U. S. 97, 102, 47 L. Ed. 400, 403, 23 S. Ct. 272.

It is contended, however, that the procedure prescribed by the statute to effect the escheat fails to conform to the re-[fol. 72] quirement of due process. This contention cannot be sustained. The statute does not purport to divest a corporation of title to land which it holds beyond the prescribed period. It makes such holding the ground for an action to effect the escheat; but the corporation continues to own and hold the property until title thereto is divested by judgment rendered in the action brought pursuant to the statute. 19 Am. Jur. 399, Sec. 33. The corporation must be made a party to the action. It will have full opportunity to be heard in defense. It goes without saying that judgment to effect escheat may be rendered only if the cause of action is established. If the cause is established and judgment to effect escheat rendered, the county must dispose of the land within one year "at public auction to the highest bidder" and the proceeds of the sale, after payment of expenses of the action and of the sale, must be paid to the corporation. It is true the statute does not prescribe the form of notice of sale, or the manner of publication thereof; but it does require sale to be made within a year, and that the sale be a public one. (The sale is predicated upon the judgment effecting the escheat.) The corporation has a direct interest in the sale, and the court has the power to protect the rights of the corporation as to the notice and conduct of the sale, by appropriate provisions in its judgment. Greenwood vs. Union Freight R. Co. 105 U. S. (15 Otto) at page 19, 26 L. Ed. at page 964; Church of Jesus Christ of L. D. S. vs. United States, 136 U. S. 1, 34 L. Ed. 478, 10 S. Ct. 792.

Plaintiff contends that the statute makes a purely arbitrary and unreasonable discrimination against all general corporations, and in favor of certain cooperative corporations, in contravention of the provision of the Fourteenth Amendment to the Constitution of the United States that

"no state shall * * * deny to any person within its jurisdiction the equal protection of the laws" and of the requirement of Sec. 11 of the Constitution of North Dakota that "all laws of a general nature shall have a uniform operation."

The contentions cannot be sustained. In passing, it should be noted that it is at least doubtful whether the "equal- [fol. 73] protection-of-the-laws" clause of the Fourteenth Amendment may be invoked by the plaintiff. The inhibition in that clause relates only to persons *within the jurisdiction* of the State. The plaintiff has not rendered itself subject to suit in the courts of this state. In Blake vs. McClung, 172 US 239, 43 L. Ed. 432, 19 S. Ct. 187, the Supreme Court of the United States held: "A corporation not created by the laws of a state, nor doing business in that state under conditions that subject it to process from the courts of that state, is not within the jurisdiction of that state, within the meaning of the constitutional provision that no state shall deny to any person within its jurisdiction the equal protection of the laws." (Syllabus 6), Blake vs. McClung, 43 L. Ed. 432.

The rule announced in Blake vs. McClung, supra, seems to have been qualified to some degree in Kentucky Finance Corp. vs. Paramount Auto Exch. Corp. 262 U. S. 544, 67 L. Ed. 1112, 43 S. Ct. 636. We deem it unnecessary to determine the effect of this latter decision upon the rule announced in Blake vs. McClung, for we are agreed that the statute does not violate any rights that are or would be guaranteed to the plaintiff by the "equality-of-the-laws" clause of the Fourteenth Amendment or the "uniformity of operation" requirement of Sec. 11 of the state Constitution. Neither the equality-of-the-laws clause in the Fourteenth Amendment nor the uniformity of operation requirement of Sec. 11 of the state Constitution forbids classification. 12 Am. Jur. pp. 140 et seq.; 59 CJ pp. 722 et seq.; Brown vs. Steckler, 40 N. D. 113, 168 N. W. 670, 1 ALR 753; Peterson vs. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 ALR 1290; Bratberg vs. Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 ALR 1290.

"Classification is primarily for the legislature which has a wide discretion in respect thereof, and in determining its constitutionality, judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with

the question whether it is so lacking in any reasonable basis as to be arbitrary." 16 CJS pp. 1001, 1002.

Obviously, the inherent differences between corporations and natural persons are sufficient to justify classification whereby, for many purposes, corporations are put in one [fol. 74] classification and individuals in another. 12 Am. Jur. 199, Constitutional Law; Crescent Cotton Oil Co. vs. Mississippi, 257 U. S. 129, 66 L. Ed. 166, 42 S. Ct. 42, supra. So, likewise, corporations "may, within reasonable limits, be divided into classes, and each class given such rights, capacities and powers as the legislature may see fit." 12 Am. Jur. 197, Constitutional Law. Thus, the exempting by the legislature of farmers' mutual insurance companies, organized and doing business under the laws of the State and insuring only farm property, from the regulations of fire insurance rates imposed upon other insurance companies, does not deny to the corporations subjected to such regulations the equal protection of the laws. German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. Ed. 1011, 34 S. Ct. 612 LRA 1915C 1189. See also State ex rel. Linde vs. Taylor, 33 N. D. 76, 108, 156 N. W. 151, LRA 1918A 156, Ann. Cas. 1918A 583. And, the legislature may, without violating the constitutional guaranty of equal protection of the laws, discriminate between life and casualty companies in restricting the period to which such companies may, by agreement, limit the bringing of suits on their contracts. Metropolitan Casualty Ins. Co. vs. Brownwell, 294 U. S. 580, 79 L. Ed. 1070, 55 S. Ct. 538.

The distinctions between general corporations and co-operatives have been held repeatedly to justify classification, and "different treatment" as to each of such classes. United States vs. Rock Royal Cooperative, 307 U. S. 533, 563, 83 L. Ed. 1446, 1464, 59 S. Ct. 993; Northern Wisconsin Co-op. Tobacco Pool vs. Bekkedal, 182 Wis. 571, 197 N. W. 936, 945; Chaffee vs. Farmers' Coop. Elevator Co. 39 N. D. 585, 168 N. W. 616. See also Brown vs. Steckler, 40 N. D. 113, 168 N. W. 670, 1 ALR 763, supra; Northwestern Mut. L. Ins. Co. vs. Wisconsin, 247 U. S. 132, 62 L. Ed. 1025, 38 S. Ct. 444; Orient Ins. Co. vs. Daggs, 172 U. S. 557, 43 L. Ed. 552, 19 S. Ct. 281.

The Statute in question here authorizes co-operative corporations to acquire real estate and engage in co-operative farming or agriculture, and denies the power to so do to

corporations organized under the general corporation laws. We are agreed that in so doing the legislature did not make such arbitrary or unreasonable discrimination as to constitute a denial of the equal protection of the laws or vio- [fol. 75] late the requirement that all laws of a general nature shall have a uniform operation. In short, we believe there is a reasonable basis for the classification made.

The plaintiff contends, however, that, in any event, the provision which limits the right to acquire real estate and engage in farming or agriculture to co-operative corporations, 75 per cent of whose members or stockholders are actual farmers or residing on farms or depending principally on farming or agriculture for their livelihood, is an arbitrary or unreasonable classification and violative of the principle of equal protection of the laws. This question is not involved and may not properly be considered here. It is an elementary rule repeatedly announced with practical unanimity by the courts of this country, including the Supreme Court of the United States and this court, that a person can question the constitutionality of a statute only when and insofar as it is sought to be applied to his disadvantage. Rindge Co. vs. Los Angeles County, 262 U. S. 700, 67 L. Ed. 1186, 43 S. Ct. 689; Minot Special School Dist. vs. Olsness, 53 N. D. 683, 686, 208 N. W. 968, 45 ALR 1337; Premier-Pabst Sales Co. vs. Grosscup, 298 U. S. 226, 80 L. Ed. 1155, 56 S. Ct. 754; Henneford vs. Silas Mason Co. 300 U. S. 577, 81 L. Ed. 814, 57 S. Ct. 524; 16 CJS pp. 161, 162. "One attacking the constitutionality of a statute is not the champion of any rights except his own." Henneford vs. Silas Mason Co. supra.

"One may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right." 16 CJS pp. 161, 162.

In premier-Pabst Sales Co. vs. Grosscup, supra, the Supreme Court of the United States said: "We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. 'One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him.'"

[fol. 76] The plaintiff is not a co-operative corporation. It is not engaged in farming or agriculture. It cannot be injured by the provisions of the statute which discriminates in favor of co-operative corporations "75 per cent of whose members or stockholders are actual farmers, residing on farms or depending principally on farming for their livelihood," and against co-operative corporations 75 per cent of whose members or stockholders are not "actual farmers, residing on farms or depending principally on farming for their livelihood." According to the allegations of the plaintiff's complaint, injury is threatened to it only under the provisions which required corporations who had acquired rural real estate, used or usable for farming, at or prior to the effective date of the statute, to dispose of such real estate within ten years thereafter.

The plaintiff also contends that the statute is violative of Sec. 2 of Article 4 of the Constitution which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This contention is clearly devoid of merit. It is settled beyond controversy that a corporation is not a citizen within the meaning of Sec. 2 of Article 4, of the Federal Constitution or of Sec. 1 of Article 14 of the Amendments to the Federal Constitution as to the privileges and immunities of citizens. Orient Ins. Co. vs. Daggs, 172 US 557, 43 L. Ed. 552, 19 S. Ct. 281, supra; Waters-Pierce Oil Co. vs. Texas, 177 US 28, 45, 44 L. Ed. 657, 664, 20 S. Ct. 518; 12 Am. Jur. 100, 23 Am. Jur. 259, 8 Fletcher, Cyc. Corp. p 449.

It follows from what has been said that the order appealed from is correct. It must be and it is affirmed. The case is remanded to the district court for further proceedings conformable to law.

A. M. Christianson, James Morris, W. L. Nuessle, Thomas J. Burke, Harvey J. Miller, District Judge.

Burr, J., being disqualified, did not participate, Hon. Harvey J. Miller, Judge of Sixth Judicial District, sitting in his stead.

[fol. 77] IN THE SUPREME COURT OF NORTH DAKOTA

ASBURY HOSPITAL, a Corporation, Plaintiff and Appellant

vs.

CASS COUNTY, NORTH DAKOTA, a public corporation, R. F. Croal as States Attorney of Cass County, North Dakota, and his successors in office, and Alvin C. Strutz as attorney general of the State of North Dakota and his successors in office, Defendants and Respondents

Following Asbury Hospital v. Cass County, 72 N. D. 359, 7 N. W. 2d. 438, it is *held* that the application of the provisions of Initiative Measure, adopted June 29, 1932 (Laws 1933, pp. 494, 495), as amended by Laws 1933, Chap. 89, and Laws 1935, Chap. 111, to the plaintiff and lands owned by it in North Dakota, does not operate to infringe upon or deny to the plaintiff any rights guaranteed to it by Sec. 40, Article 1, Sec. 2, Article 4, the Fifth Amendment, and Sec. 1 of the Fourteenth, Amendment to the Constitution of the United States, or by Sections 11, 13, 16, 20, and 22 of the Constitution of North Dakota.

(Syllabus by the Court)

Action for a declaratory judgment by Asbury Hospital, a corporation, against Cass County, R. F. Croal, as State's Attorney of Cass County, and his successors in office, and Alvin C. Strutz, as Attorney General, and his successors in office, to secure a judicial declaration that certain real property owned by the plaintiff in Cass County is not subject to the provisions of an initiative measure, adopted June 29, 1932, entitled "An Act prohibiting corporation [fol. 78] farming and relating to corporations acquiring and holding real estate not necessary in the operation of their business."

Appeal from a judgment of the District Court of Cass County, Hon. P. G. Swenson, Judge.

Affirmed.

Opinion of the Court by Christianson, J.

Messrs. Nilles, Oehlert and Nilles of Fargo (Abbot L. Fletcher of Minneapolis of counsel), attorneys for Plaintiff and Appellant.

Messrs. Alvin C. Strutz, attorney general, William R. Pearce, special assistant attorney general, both of Bismarck, and R. F. Croal, state's attorney, of Fargo, attorneys for defendants and respondents.

[fol. 79] OPINION—Filed November 3, 1944

Christianson, J. This is a sequel to Asbury Hospital v. Cass County, 72 N. D. 359, 7 N. W. 2d 438. The former appeal involved an order sustaining a demurrer to the complaint. The order was affirmed. The action was brought in the District Court of Cass County under the Uniform Declaratory Judgments Act of this state (Chap. 237, Laws 1923, 1925 Supp. secs. 7712a1-7712a16), to secure a judicial declaration that certain real property owned by the plaintiff is not subject to the provisions of an initiative measure, adopted June 29, 1932, entitled "An act prohibiting corporation farming and relating to corporations acquiring and holding real estate not necessary in the operation of their business." (Laws 1933, pp. 494, 495,) and amended by chap. 89, Laws 1933, and chap. 111, Laws 1935.

The plaintiff is a nonprofit corporation organized under the laws of the state of Minnesota and the owner of certain land in Cass County in this state which it acquired in November 1925. The facts are set forth fully in the former opinion and need not be restated here.

In its complaint the plaintiff alleged that application of the statute in question here as against the plaintiff and its said real estate would infringe upon the violate rights guaranteed to it by Article 1, Section 10, Article 4, Section 2, and the Fifth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States, as well as Sections 11, 13, 16, 20 and 22 of the Constitution of North Dakota. On a former appeal these constitutional questions were raised and were decided by the decision of this court. On this appeal, plaintiff by appropriate assignments of error has presented the same constitutional questions and they have been supported and argued both [fol. 80] in the written briefs and on the oral argument.

After the case had been remanded to the district court, following the decision on the former appeal, the trial court made findings of fact, wherein it found the facts alleged

in the amended complaint to be true. From the facts so found the court drew the following Conclusions of Law:

"1. This action was properly brought for a declaratory judgment under the Declaratory Judgments Act of this State and the facts present an actual controversy of a justiciable character between the parties having adverse interests.

2. The initiated statute of North Dakota (Laws 1933, p. 494, Sections 4 and 5, and Sections 1 and 3, as amended by Laws 1933, c. 89) requiring corporations to dispose of realty usable for agriculture, may be constitutionally applied to realty acquired before the adoption of the statute, or acquired by foreclosure of mortgage executed before the adoption of the statute.

3. Plaintiff was not brought within the statutory exception authorizing corporations to continue to hold realty usable for agriculture if 'reasonably necessary in the conduct of their business' merely because its articles of incorporation authorized it to acquire and hold realty.

4. The enforcement of said initiated measure of North Dakota against the plaintiff, would not deprive the plaintiff of its property without due process of law, or deny to it the equal protection of the law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

5. Said initiated measure does not operate to impair the obligation of contract between the State and the plaintiff or impair or divest any vested property right, and within the meaning of the Fourteenth Amendment of the Constitution of the United States and within the meaning of Article 4, Section 2 thereof.

6. The Fourteenth Amendment of the Constitution of the United States prohibits denial of equal protection of the laws only to persons within the jurisdiction of the State, and cannot be relied upon by the plaintiff in this case.

7. Plaintiff is not a citizen within the meaning of Article 4, Section 2 of the Constitution of the United

[fol. 81] States governing privileges and immunities of citizens.

8. Plaintiff could not be injured by the amendment to said law discriminating in favor of corporations as defined therein, and hence cannot urge such discrimination in claiming such statute to be unconstitutional.

9. Said initiated measure, as against the plaintiff, is not in contravention of any of the provisions of the Constitution of the United States or amendments thereto, set forth in the bill of complaint herein; neither is said legislation in violation of or in contravention of any of the provisions of the Constitution of the State of North Dakota relied upon by the plaintiff in the bill of complaint.

10. This Court having assumed jurisdiction of this case as one property brought for a declaratory judgment and for injunctive relief, and having declared the law, now does, in accordance with such declaration, deny plaintiff's application for perpetual injunction against the defendants, prohibiting defendants and their successors in office from enforcing or attempting to enforce such legislation against the plaintiff's property."

Final judgment was entered in accordance with the findings and the conclusions and the plaintiff has appealed.

The facts is found by the trial court are precisely the same as those set forth in the complaint, which was considered on the former appeal. The same contentions were advanced on that appeal that are advanced on this appeal. While the former appeal was from an intermediate order (Comp. Laws 1913, sec. 7832; Devereaux v. Katz, 22 N. D. 351, 133 N. W. 553; Langer v. The Courier News, 48 N. D. 280, 183 N. W. 1009) and this is an appeal from a final judgment, the decision on the former appeal became and is the law of the case, 5 C. J. S. p. 1267, et seq.; Schmidt v. Beiseker, 19 N. D. 35, 120 N. W. 1096; Stimson v. Stimson, 30 N. D. 78, 152 N. W. 132; Dubs v. Northern Pacific Railway Company, 51 N. D. 113, 199 N. W. 191; Wittmayer v. Security State Bank of Upham, 57 N. D. 934; 224 N. W. 303; Anderson v. Northern & Dakota Trust Company, 67 [fol. 82] N. D. 458, 484-485, 274 N. W. 127, 140; Pearce v. North Dakota Workmen's Compensation Bureau, 68 N. D.

318, 279 N. W. 601; Jacobson v. Mutual Benefit Health & Accident Assn., 70 N. D. 566, 296 N. W. 545.

In the decision on the former appeal, we held that the statute in question was applicable to the plaintiff and its real estate, and that the application and enforcement of the statute against the plaintiff as to the tract of land in question here will not operate to infringe upon or deny any right guaranteed to it by the several provisions of the Constitution of the United States and the Constitution of the State of North Dakota which it has invoked. We adhere to the views expressed and the principles announced in the decision on the former appeal and the determination there made of the several contentions that were advanced by the plaintiff on that appeal and that are advanced against on this appeal.

The judgment appealed from is affirmed.

A. M. Christianson, W. L. Nuessle, Thomas J. Burke, James Morris, Harvey J. Miller, District Judge.

Mr. Justice Burr, deeming himself disqualified, did not participate, Hon. Harvey J. Miller, Judge of Sixth Judicial District, sitting in his stead by request.

[fol. 83] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal

The petition of Asbury Hospital, a corporation, the appellant in the above entitled cause, for an appeal in such cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of North Dakota, having been filed with the Clerk of this Court, and presented herein, accompanied by Assignment of Errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby—

Ordered that an appeal be, and it is hereby allowed to the Supreme Court of the United States from the final judgment dated November 3, 1944, of the Supreme Court of North Dakota, as provided in said petition, and that the Clerk of the Supreme Court of North Dakota shall, within forty (40) days from this date, make and transmit to the Supreme

Court of the United States under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by the praecipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered That said appellant shall give a good and sufficient cost bond in the sum of Two hundred fifty ($250.00) Dollars, and that said appellant shall prosecute said appeal to effect, and answer all costs if it fails to make its plea good.

Dated this 9th day of January, 1945.

[fol. 84] A. M. Christianson, Chief Justice of Supreme Court of State of North Dakota.

[fols. 85-86] Bond on Appeal for $250 approved January 9, 1945, omitted in printing.

[fols. 87-89] Citation in usual form omitted in printing.

[fol. 90] In Supreme Court of the United States

[Title omitted]

Stipulation as to Transcript of Record

Comes now the appellant and the appellees in the above entitled cause, and mutually stipulate and agree that in making up the transcript on the appeal herein to the Supreme Court of the United States, the Clerk of the Supreme Court of North Dakota shall include therein the following:

1. Plaintiff's and Appellant's Amended Complaint.

2. Demurrer of the defendants and appellees.

3. Order dated January 6, 1942 of the Hon. P. G. Swenson, Judge of the Cass County District Court of North Dakota, sustaining such demurrer to such amended Complaint.

4. Opinion of the Supreme Court of North Dakota dated January 2, 1943, modified on January 25, 1943, and as found reported in 72 N. D. 359, 7 N. W. (2d) 438. (Copy is attached as Exhibit "A" to Jurisdictional Statement.)

5. Findings of Fact, Conclusions of Law, Order for Judgment and Judgment entered and filed in the Cass County, North Dakota District Court on December 15, 1943.

6. Opinion of the Supreme Court of North Dakota dated November 3, 1944. (Copy is attached as Exhibit "B" to Jurisdictional Statement.)

7. Final Order for judgment of the Supreme Court of North Dakota in said cause, rendered on November 3, 1944, and in affirmance of said judgment of the Cass County District Court.

8. Petition for appeal to the Supreme Court of the United States.

9. Assignment of Errors and prayer for reversal filed with such petition.

10. Jurisdictional Statement filed with such petition.

11. Order of the Chief Justice of the Supreme Court of the State of North Dakota allowing said appeal, and fixing the amount and terms of the cost bond on appeal to the Supreme Court of the United States.

12. Cost bond and indorsement of approval thereon.

13. Citation with proofs of service thereof.

[fol. 91] 14. Statement in compliance with Paragraphs 2 and 3 of Rule 12 of the Rules of Supreme Court of the United States, with the acknowledgmen of service indorsed thereon.

15. This Stipulation.

16. Certificate of the Clerk.

It is further stipulated and agreed that the foregoing describes all of the papers and records necessary to a determination of the appeal herein.

Dated this 9th day of January, 1945.

Paul J. Thompson, Abbott L. Fletcher, Herbert G. Nilles, L. H. Oehlert, John J. Nilles, Attorneys for Appellant. Nels G. Johnson, Attorney General; Ralph F. Croal, State's Attorney for Cass County, North Dakota, Attorneys for defendants and appellees.

[fol. 92] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 93] In Supreme Court of the United States

Statement of Points and Designation of Parts of Record to Be Printed—Filed February 12, 1945

Comes now the appellant, and adopts its assignment of errors as its statement of the points to be relied upon, and represents that the whole of the record as filed is necessary for the consideration of the case.

Dated February 8th, 1945.

Paul J. Thompson, Abbott L. Fletcher, Office and Postoffice Address: 600-612 Midland Bank Bldg., Minneapolis, Minnesota; Herbert G. Nilles, E. H. Oehlert, John J. Nilles, Office and Postoffice Address: 504 Black Building, Fargo, N. Dak., Attorneys for Appellant.

[fol. 94] Affidavit of Mailing

State of North Dakota,
County of Cass, ss:

Sena Wentworth, being first duly sworn, on her oath deposes and says that she is a resident of the City of Fargo, Cass County, North Dakota, is over the age of 21 years, and is not a party to nor otherwise interested in the above entitled matter.

That she served the attached Statement of points and designation of parts of record to be printed upon the above named defendants and appellees on the 8th day of February, 1945, in the following manner: by depositing in the United States Postoffice at Fargo, North Dakota, on said date, in sealed envelopes, with postage thereon fully prepaid, addressed to the attorneys of record for said defendants and appellees at their addresses and places of residence, viz:

R. F. Croal, as States Attorney of Cass County, North Dakota, Fargo, North Dakota;

Hon. Nels G. Johnson, as Attorney General of the State of North Dakota, Bismarck, North Dakota;

true and correct copies of the attached Statement of points and designation of parts of record to be printed.

Sena Wentworth.

Subscribed and sworn to before me this 8th day of February, 1945. L. H. Oehlert, Notary Public, Cass County, N. Dak. My Commission Expires July 1st, 1949. (Seal.)

[fol. 94a] [File endorsement omitted.]

[fol. 95] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—March 5, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on Cover: File No. 49,380. North Dakota, Supreme Court. Term No. 35, Asbury Hospital, a Corporation, Appellant, vs. Cass County, North Dakota, a public corporation, R. F. Croal, as States Attorney of Cass County, North Dakota, et al. Filed February 6, 1945. Term No. 35 O. T. 1945.

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 6 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. [redacted] 35

ASBURY HOSPITAL, A CORPORATION,
Appellant,

vs.

CASS COUNTY, NORTH DAKOTA, A PUBLIC CORPORATION, R. F. CROAL, AS STATE'S ATTORNEY OF CASS COUNTY, NORTH DAKOTA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

STATEMENT AS TO JURISDICTION

PAUL J. THOMPSON,
ABBOTT L. FLETCHER,
HERBERT G. NILLES,
L. H. OEHLERT,
JOHN J. NILLES,
Counsel for Appellant.

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IN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 927

ASBURY HOSPITAL, A CORPORATION,
Plaintiff and Appellant,

vs.

CASS COUNTY, NORTH DAKOTA, A PUBLIC CORPORATION; R. F. CROAL, AS STATE'S ATTORNEY OF CASS COUNTY, NORTH DAKOTA, AND HIS SUCCESSORS IN OFFICE; AND ALVIN C. STRUTZ, AS ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, AND HIS SUCCESSORS IN OFFICE,
Defendants and Appellees.

JURISDICTIONAL STATEMENT

Comes now Asbury Hospital, a corporation, the petitioner and appellant herein, pursuant to Rule 12 of the Rules of the Supreme Court of the United States, and in support of its petition for an appeal to the Supreme Court of the United States from the Supreme Court of the State of North Dakota in the above entitled cause, and states as follows:

I

Jurisdiction of this appeal is sustained by Sec. 237 (a) of the Judicial Code of the United States, also cited as Sec. 344 (a) of Title 28 of the United States Code Annotated.

II

The validity of the Initiative Measure adopted in North Dakota on June 29, 1932, entitled "An Act prohibiting corporation farming and relating to corporations acquiring and holding real estate not necessary in the operation of their business," is involved. This Initiative Measure is found and cited in the North Dakota Session Laws for 1933, pages 494 and 495, as amended by Chapter 89 of the North Dakota Session Laws for 1933, and as further amended by Chapter 111 of the North Dakota Session Laws for 1935. Such Initiative Measure is set forth verbatim in Paragraph VI hereof. The final decision and judgment of the Supreme Court of North Dakota, the highest court of the State of North Dakota, was in favor of the validity of such Initiative Measure, notwithstanding the contention of the appellant that such legislation is violative of appellant's constitutional rights under and is repugnant to the Fourteenth Amendment, Article 1 Section 10, Article 4 Section 2 and the Fifth Amendment to the Constitution of the United States.

III

The final decision and judgment of the Supreme Court of the State of North Dakota was made and entered on November 3, 1944 (R. 24), and the application for this appeal is presented on January 9th, 1945. (R. 25)

IV

This case originated in the District Court of Cass County, North Dakota, and no state question was raised or decided

adequate to sustain such decision and judgment of the Supreme Court of the State of North Dakota, if said judgment and decision are erroneous on the questions of Federal constitutional law raised by the appellant in its amended Complaint for a declaratory judgment, and which questions have been maintained by the appellant, and have been adversely decided to the appellant's contentions. Said judgment of the Supreme Court of the State of North Dakota was a final and complete judgment in favor of the validity of such Initiative Measure and amendments thereto, and unless reversed by the Supreme Court of the United States, nothing remains or can be done to protect the constitutional rights of the appellant, and such judgment cannot be reversed, annulled, modified or corrected except upon review by the Supreme Court of the United States.

V

Appellant relies upon the following statutes and cases to sustain the jurisdiction of the Supreme Court of the United States in this cause:

(a) This action was brought under the Uniform Declaratory Judgments Act of the State of North Dakota, being and cited as Chapter 237 of the North Dakota Session Laws for 1923, also cited as Sections 7712a1 to 7712a16 of the 1925 Supplement to the North Dakota Compiled Laws for 1913. In a former appeal involving an order sustaining a demurrer to the amended Complaint in this cause, the Supreme Court of North Dakota held that, whether such Initiative Measure is valid under the United States constitutional provisions heretofore mentioned, is a controversy properly determinable under such Declaratory Judgments Act. See *Asbury Hospital* v. *Cass County, et al.*, 72 N.D. 359, 7 N. W.(2d) 438, and also same case, — N. D. —, 16 N.W. (2d) 513, both opinions as referred to in Paragraph

VI and copies of which are attached to this statement of the jurisdiction. (R. 43 and 71) In this connection, it should also be noted that it has already been held in the case of *Nashville C. & St. L. Ry. Co.* v. *Wallace* (1933) 288 U. S. 249, 77 L. Ed. 730, that the Supreme Court of the United States has jurisdiction to review a declaratory judgment such as is here involved.

(b) The main contentions of the appellant in this case and in this appeal under the Federal constitutional provisions heretofore cited are, that the Initiative Measure in question deprives the appellant of its property and vested rights in real property acquired before such Initiative Measure became effective without due process of law; that the implied contract existing between the appellant and the State of North Dakota is impaired; that such Initiative Measure is also invalid because it discriminates unlawfully between corporations, and does not afford appellant equal protection under the laws. (R. 31) Appellant contends that it became the owner in fee simple of the land in question before such legislation was passed; it became the owner with the permission of the State of North Dakota; its rights as owner entitled it not only to the land, but it became possessed of all the incidents of ownership, including the right to determine when, or how, or to whom, or for what price, it might elect to sell the land; its rights in the property were fully vested before the challenged legislation was passed; the application of this legislation to this land and the escheat of the land and its forced sale takes its property without due process of law; it requires a sale independently of the consent of the owner; the legislation deprives the owner of its use during the escheat period; and no provision is made for a review by legal or other proceedings of a sale made by the county; the legislation was not passed as an exercise of the police power, nor did

the courts of North Dakota attempt to sustain it upon that ground. The State, under the guise of corporate regulation, cannot take property without due process of law. Appellant also contends that when the State of North Dakota permitted appellant to acquire this real estate with no restrictions or conditions attached to its ownership, an implied contract came into existence which is unconstitutionally impaired by the application of this legislation to it. Appellant further contends that such legislation discriminates unlawfully between corporations, and denies appellant the equal protection of the laws because certain classes of corporations are held to be exempt from the operation of the law. Appellant was in fact within the state within the meaning of the Constitution because it owned land here, and was thus subject to the State's authority, and in any event, it was not required to, nor was any provision made whereby it might, qualify as a foreign corporation. (R. 31) The statutes of North Dakota relating to foreign corporations have no application to corporations owning lands acquired through mortgage foreclosures, nor to non-profit corporations. (See Chap. 99 of North Dakota Session Laws for 1929, and see also Chap. 116 of North Dakota Session Laws for 1937.)

Appellant relies upon the following cases to show that a substantial Federal question is presented:

Buchanan v. *Warley*, 245 U. S. 60, 62 L. Ed. 149;
Shields v. *Ohio*, 95 U. S. 319, 24 L. Ed. 357;
The Boston Beer Co v. *Massachusetts*, 97 U. S. 25; 24 L. Ed. 989;
Union Pac. Railroad Co. v. *United States*, 99 U. S. 700, 25 L. Ed. 496;
Greenwood v. *Union Freight Railroad Co.*, 105 U. S. 13, 26 L. Ed. 961;

Lake Shore Railway Co. v. *Smith*, 173 U. S. 684, 43 L. Ed. 858;

Adirondack Ry. Co. v. *New York*, 176 U. S. 335, 44 L. Ed. 492;

Missouri Pacific R. Co. v. *Nebraska*, 164 U. S. 403, 41 L. Ed. 489;

Fair Haven & Westville Ry. Co. v. *New Haven*, 203 U. S. 379, 51 L. Ed. 237;

Sears v. *Akron*, 246 U. S. 242, 62 L. Ed. 688;

Coombes v. *Getz*, 285 U. S. 434, 76 L. Ed. 866;

Phillips v. *Jenkins*, 297 U. S. 629, 80 L. Ed. 943;

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1, 54 L. Ed. 355;

Chicago, M. & St. Pac. R. Co. v. *Wisconsin*, 238 U. S. 491, 59 L. Ed. 1423;

Herndon v. *Chicago Rock Island Pac. Ry. Co.*, 218 U. S. 135, 54 L. Ed. 970;

Seaboard Air Line Ry. Co. v. *Railroad Commission*, 155 Fed. 792;

St. Louis & S. F. Ry. Co. v. *Cross*, 171 Fed. 480;

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679;

Southern Railway Co. v. *Greene*, 216 U. S. 400, 54 L. Ed. 536;

Cotting v. *Godard*, 183 U. S. 79, 46 L. Ed. 92;

Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927;

Kentucky Finance Corporation v. *Paramount Auto Exchange*, 262 U. S. 544, 67 L. Ed. 1112;

VI

Plaintiff and appellant brought this suit in the District Court of Cass County, North Dakota, under the Uniform Declaratory Judgments Act of such state (Chap. 237 North

Dakota Session Laws 1923, 1925 Supplement Sections 7712a1-7712a16), to secure a judicial declaration that certain real property owned by the plaintiff and located in Cass County, North Dakota, is not subject to the provisions of the Initiative Measure adopted June 29, 1932, entitled "An Act prohibiting corporation farming and relating to corporations acquiring and holding real estate not necessary in the operation of their business" (North Dakota Session Laws 1933, pp. 494, 495), and amended by Chap. 89, Laws 1933, and Chap. 111, Laws 1935. (R. 1-2.) The Initiative Measure as amended by Chap. 89 of North Dakota Session Laws of 1933 reads as follows:

> "That all corporations, both domestic and foreign, except as otherwise provided in this Act, are hereby prohibited from engaging in the business of farming or agriculture." (Section 1, Chap. 89 North Dakota Session Laws of 1933.)
>
> "That all corporations, both domestic and foreign, *who now own or hold rural real estate, used or usable, for farming or agriculture*, except such as is reasonably necessary in the conduct of their business, *shall dispose of the same within ten years from the date that this Act takes effect*, provided that during said ten year period said corporations may farm and use said real estate for agricultural purposes provided further that the ten year limitation provided by this Section shall be deemed a covenant, running with the title to the land against any grantee, successor of (or) assignee of such corporation, which is also a corporation." (Section 2, Chap. 89 North Dakota Session Laws of 1933.)
>
> "That any corporation, either domestic or foreign, that acquires any rural real estate, used or usable, for farming or agriculture, by judicial process or operation of law, hereafter, except such as is reasonably necessary in the conduct of its business, shall dispose of such real estate within ten years from the date that it is so acquired, provided that during said ten

year period it may farm and use the same for agricultural purposes, provided further that the ten year limitation provided by this Section shall be deemed a covenant; running with the title to the land against any grantee, successor of (or) assignee of such corporation, which is also a corporation." (Section 3 Chap. 89 North Dakota Session Laws of 1933.)

"That the title and ownership of any real estate acquired, in any manner, by any domestic or foreign corporation, since the approval and adoption of the aforesaid initiated law, is hereby declared to be legal and valid for all purposes, notwithstanding any provisions in said initiated law contained, but subject however, to all of the provisions now contained in said initiated law, as hereby amended and reenacted." (Section 4, Chap. 89 North Dakota Session Laws of 1933.)

"That nothing in this Act shall be construed to prohibit cooperative corporations, seventy-five per cent of whose members or stockholders are actual farmers, residing in (on) farms or depending principally on farming for their livelihood, from acquiring real estate and engaging in cooperative farming or agriculture." (Section 4, Initiated Measure (North Dakota Session Laws of 1933, pp. 494, 495.)

"That in case any corporation, either domestic or foreign, violates any provisions of this Act and fails within the time fixed by this Act to dispose of any real estate after it has acquired title to same, which is not reasonably necessary for the conduct of its business, then title to such real estate shall escheat to the county in which such real estate is situated upon an action instituted by the State's Attorney of such county, and such county shall within one year dispose of same at public auction to the highest bidder, and the proceeds of such sale, after all expenses of such procedure shall have been paid shall be paid to the corporation that formerly owned the same." (Section 5, Initiated Measure, North Dakota Session Laws of 1933, pp. 494, 495.)

This statute became effective as law in North Dakota on July 29, 1932. The statute was amended by the legislative assembly in 1935 (Laws 1935, Chap. 111) but the provision amended and the amendment are not material to the issues.

The plaintiff in its amended Complaint alleges, (R-1) and the Court found, that it is a non-profit corporation with perpetual existence, organized under the laws of the State of Minnesota;

> "that it is a corporation of, and subject to the discipline of the Methodist Episcopal Church and is created and exists for religious and charitable purposes solely; that under the laws of the State of Minnesota said corporation has the power to sue in any court and to acquire by purchase or otherwise, hold, enjoy, improve, lease, encumber and convey real and personal property;" (R-2)

that prior to 1925 the plaintiff became the owner of a certain real estate mortgage upon a quarter section of land in Cass County, in this state; that on November 27th, 1925, it became the owner of the real property covered by such mortgage, the same having been conveyed to it by the owner in liquidation and satisfaction of the indebtedness secured by the mortgage; that the plaintiff still is the owner in fee simple of such real property; (R. 2-3)

> "that the said real property is farming land used and usable for farming and agriculture;" (R-3)

That plaintiff is not engaged in the business of farming and agriculture, but that since the date of acquisition of such property the same has been farmed, by individuals who are residents of North Dakota, under various farm lease contracts; (R-3) that on the date the said real estate mortgage was acquired by the plaintiff, and on the date that

it acquired title to, and ownership of, said real property, plaintiff had the right and power, under its articles of incorporation and the laws of Minnesota, to be and become the owner of such mortgage and of said real property;

"that at the time and on the date that plaintiff became the owner of said mortgage and of said real estate, there existed in North Dakota no law or statute restricting or forbidding plaintiff's ownership of said mortgage or of said real estate, and that when said mortgage and said real estate were acquired by the plaintiff, plaintiff had the right under the laws of the state of North Dakota as they then existed, to be and become the full, unrestricted and unconditional owner of said mortgage and of said real estate, and to acquire a full, complete and indefeasible title in and to said property" (R. 3).

Such complaint further sets forth the legislative enactments quoted above, and alleges, and the Court found, that the defendant, Cass County, the defendant, R. F. Croal, the duly elected State's Attorney of said county, and the defendant, Alvin C. Strutz, the duly elected and acting Attorney General of the State of North Dakota, and their successors in office, unless restrained and enjoined from so doing, will enforce such laws and will commence action to the end that the title to such real property shall escheat to Cass County immediately upon the lapse of the ten year period ending on July 29, 1942, in accordance with the provisions of such Initiative Measure and acts amendatory thereof (R. 5).

It is further alleged in such Complaint, and the Court found, that the plaintiff, since the year 1930, has constantly attempted to sell the real property in question, but that it has been unable to sell the same for the amount of the mortgage originally on it, and that it will be unable to sell the

land prior to July 29th, 1942; that any sale which plaintiff might be able to make would be substantially below the amount of money plaintiff has invested therein, and that any sale of the property that might be made by the county pursuant to proceedings had under the above mentioned legislative enactments would be for less than the amount of the mortgage, and that the cost and expense of such action and of such sale would result in further decreasing any amount that might be received upon sale. It is also alleged

> "that said real estate above described is not necessary for the conduct of the plaintiff's business, excepting in the following respects: Plaintiff is permitted by the laws of the State of Minnesota to make investments of funds not immediately required for its operations and the ownership of said mortgage or mortgages and the subsequent acquisition of title to the lands covered by said mortgages, represents a legal and lawful function and exercise of one of the powers of the plaintiff as a corporation; that the holding of such surplus funds in such investments is a legal and lawful function and power of plaintiff as a corporation and such investments constitute a part of the conduct of its business" (R. 13).

It is further alleged that application and enforcement of said legislative enactments as against the plaintiff and its said real property, would be violative of rights guaranteed to the plaintiff by Section 10 of Article 1, Section 2 of Article 4 of the Constitution of the United States, by Section 1 of Article 14 of the Amendments thereto (R. 11).

It is further alleged, and the Court found, that an actual controversy exists between the plaintiff and the defendants as to the applicability of said legislative enactments to the plaintiff and its said real property, and as to whether such legislation, if applicable, is violative of the constitu-

tional rights of the plaintiff under the above mentioned constitutional provisions (R. 5).

In such complaint, judgment is asked that the said legislative enactments be adjudged to be not applicable to plaintiff or its said land, or to any farm lands that were acquired prior to July 29th, 1932, the effective date of such legislation, or to any lands that were acquired subsequent to that date upon the foreclosure of liens or mortgages that were legally effective prior to that date; that if the Court adjudge and declare that such legislation is applicable to the plaintiff and to its property so acquired prior to the enactment of such legislation, in that event the court adjudge that such legislation is invalid as unconstitutional and unenforceable, and that the appropriate judgment be entered to prevent the defendants from instituting any action or proceeding against the defendant under the aforesaid legislative enactments (R. 14-15).

The defendants and appellees interposed a general demurrer (R. 16). The trial Court sustained the demurrer (R. 17). In its order, the trial Court ruled that "the subject matter of this action and the facts set forth" in the Complaint constitute a proper action for a declaratory judgment, but that such facts do not constitute a cause of action so as to entitle plaintiff to any relief against the application and enforcement of the statute against the plaintiff and its land. The order was accompanied by a memorandum opinion wherein the Court considered at some length the various contentions advanced by the plaintiff and held: that the statute in question is applicable to the plaintiff corporation and the tract of land described in the Complaint; and that the statute is not violative of any of such constitutional provisions invoked by the plaintiff.

The plaintiff appealed from such order sustaining the demurrer to the Supreme Court of the State of North Dakota, and such Court affirmed such order in *Asbury Hospital* v. *Cass County, et al.*, 72 N. D. 359, 7 N. W. (2d) 438, and a copy of which decision is hereto attached, marked Exhibit "A", and made a part hereof by reference (R. 43).

Under the laws pertaining to the practice and procedure in the State of North Dakota, such appeal from the order sustaining the demurrer constituted an appeal from an intermediate order. (See Section 7832, North Dakota Compiled Laws for 1913, and see the cases of *Devereaux* v. *Katz*, 22 N. D. 351, 133 N. W. 553, and *Langer* v. *Courier News*, 48 N. D. 280, 183 N. W. 1009; *Asbury Hospital* v. *Cass County et al.*, — N. D. —, 16 N. W. (2d) 523).

Following the remand of the case to the trial Court, being the District Court of Cass County, North Dakota, further proceedings were had, and the matter again came on before such Court on December 15, 1943, and appellant and appellees having elected to plead no further, the Court proceeded to make and file findings of fact, conclusions of law, order for judgment, and judgment, finding as true the allegations of fact as set forth in plaintiff's said Complaint, but denying the relief sought by the plaintiff and the appellant, except to declare the law in accordance with the decision of the Supreme Court of North Dakota (R. 18-21). From such final judgment, the plaintiff and appellant again duly appealed to the Supreme Court of the State of North Dakota, which is the highest court of said state in which a decision in this suit can be had, and in such appeal the appellant raised and asserted the same contentions and errors as were asserted in the appeal from the intermediate order sustaining such demurrer. The

errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the Assignment of Errors filed herewith (R. 31).

That thereafter, and on the 3rd day of November, 1944, the Supreme Court of North Dakota delivered and filed its opinion and final judgment in this cause, and affirmed such judgment of the Cass County District Court, holding in effect that such Initiative Measure and acts amendatory thereof were lawful and valid, and consistent with the provisions of the Constitution of the United States heretofore cited and relied on by the appellant. That a copy of the opinion of the Supreme Court of North Dakota upon such second appeal in affirmance of such final decision and judgment is hereto attached, marked Exhibit "B", and made a part hereof by reference (R. 24-71).

VII

That the Supreme Court of North Dakota is the highest court of the State of North Dakota in which a decision in this suit can be had. That as evidenced by such decisions of such Court, there was drawn in question in all stages of this suit the validity of such Initiative Measure and acts amendatory thereof, on the ground that such legislation as applied to the appellant is repugnant to the provisions of the Constitution of the United States heretofore referred to and relied upon by the appellant, and that such decision and judgment is in favor of the validity of such legislation, notwithstanding the appellant's contention that such legislation violates the United States constitutional provisions heretofore referred to.

WHEREFORE, the petitioner and appellant believes that the Supreme Court of the United States has jurisdiction of this appeal, and that the appeal ought to be allowed,

and that such decisions and judgment of the Supreme Court of North Dakota ought to be reviewed and reversed.

Dated this 9th day of January, 1945.

Respectfully submitted,

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EXHIBIT "A"

IN THE SUPREME COURT, STATE OF NORTH DAKOTA

(Reported in 72 N. D. 359, 7 N. W. (2d) 438)

ASBURY HOSPITAL, a Corporation, Plaintiff and Appellant,

vs.

CASS COUNTY, NORTH DAKOTA, a Public Corporation; R. F. Croal, as State's Attorney of Cass County, North Dakota, and His Successors in Office; and Alvin C. Strutz, as Attorney General of the State of North Dakota, and His Successors in Office, Defendants and Respondents

1. The Declaratory Judgments Act (Supp. 1925, Sections 7712a-7712a16) is intended to provide a method whereby parties to a justiciable controversy may have the same determined by a court in advance of any invasion of rights or breach of obligation. But no action or proceeding lies under the Declaratory Judgments Act to obtain a decision which is merely advisory, or which determines only abstract questions. The action or proceeding must involve an actual controversy of a justiciable character between parties having adverse interests.

2. In the instant case it is *held*, for reasons stated in the opinion, that a controversy as to whether a statute which requires corporations to dispose of certain rural real estate within a prescribed period is applicable to the plaintiff and to certain real estate owned by it, is one properly determinable under the Declaratory Judgments Act.

3. Where the language of a statute is clear, certain, and unambiguous, the courts have only the simple and obvious duty to give effect to the intention which the legislature has thus expressed.

4. Initiative Measure, adopted June 29, 1929 (Laws 1933, pp. 494, 495), as amended by Laws 1933, Chap. 89, and Laws 1935, Chap. 111, which provides that "all corpora-

tions, both domestic and foreign, who now own or hold rural real estate, used or usable, for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall dispose of the same within ten years from the date that this Act takes effect," and that in case any corporation fails within the time fixed to dispose of such real estate, then "title to such real estate shall escheat to the county in which such real estate is situated upon an action instituted by the state's attorney of such county," does not mean that corporations are required to dispose only of real estate that had been acquired, and was being held, ultra vires.

5. Such Initiative Measure, as amended, does not ipso facto effect an escheat if a corporation fails to dispose of real estate within the prescribed period. The holding of real estate, which the statute requires a corporation to dispose of, beyond the prescribed period, constitutes a basis for an action to effect escheat; but the corporation continues to own and hold the real estate until title is divested by judgment rendered in the action brought to effect the escheat.

6. A corporation can have no legal existence beyond the bounds of the state which created it; and, although it may act in another state, it cannot do so as a legal or constitutional right but only by the comity and consent of such state.

7. Subject to the constitutional limitations that a state cannot exclude a corporation engaged in interstate commerce, or a corporation that is an agency or instrumentality of the Federal Government, a state may prohibit foreign corporations from doing business therein, or it may make the right to do business depend on such terms and conditions as in its discretion it may see fit to impose.

8. A foreign corporation which does business or carries on any activity in a state through comity or acquiescence, or under a license given without valuable consideration, does not have a contract binding the state not to restrict the activities of the corporation in, or to exclude it from, the state.

9. A state may prohibit all foreign corporations, which it might exclude from the state, from acquiring real estate therein for any purpose. The state, also, has the power to require all foreign corporations, which it might exclude from the state, to dispose of all real estate not reasonably necessary in the conduct of their business, provided it affords such corporations a reasonable time in which to dispose of such real estate.

10. For reasons stated in the opinion, it is *held*, that the requirement of the statute that corporations dispose of real estate of the character described in the statute, which the corporations owned when the statute became effective, within ten years thereafter, did not, nor did the procedure prescribed by the statute, operate to deprive the plaintiff of property without due process.

11. The justice, wisdom, necessity, utility and expediency of legislation are questions for legislative, and not for, judicial determination.

12. The "equality-of-the-law," clause of the 14th Amendment to the Constitution of the United States, and the "uniformity of operation" requirement of Section 11 of the state Constitution do not forbid classification.

13. Classification is primarily for the legislature; and in determining the validity of legislative classification, judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it is so lacking in any reasonable basis as to be arbitrary.

14. There are such distinctions between general corporations and co-operative corporations as to justify classification, and different treatment as to each of such classes.

15. One may attack the constitutionality of a statute only when and so far as it is being, or is about to be, applied to his disadvantage; and to raise the constitutional question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right.

16. A corporation is not a citizen within the meaning of the provisions of the Constitution of the United States

(Art. 4, Section 2, and Section 1, Fourteenth Amendment) as to privileges and immunities of citizens.

(Syllabus by the Court)

Opinion filed January 2, 1943. Modified January 25, 1943.

Appeal from the District Court of Cass County

SWANSON, J.

Action for a declaratory judgment by Asbury Hospital, a corporation, against Cass County, R. F. Croal, as State's Attorney of Cass County, and his successors in office, and Alvin C. Strutz, as Attorney General, and his successors in office, to secure a judicial declaration that certain real property owned by the plaintiff in Cass County is not subject to the provisions of an initiative measure, adopted June 29, 1932, entitled "An Act prohibiting corporation farming and relating to corporations acquiring and holding real estate not necessary in the operation of their business."

From an order sustaining a demurrer to the complaint, the plaintiff appeals.

Affirmed. Opinion of Court by Christianson, J.

Nilles, Oehlert & Nilles (Abbott L. Fletcher, of counsel), for appellant.

Alvin C. Strutz, Attorney General, Wm. R. Pearce, Assistant Attorney General, and Ralph F. Croal, State's Attorney, for respondents.

Traynor & Traynor, Sinnes & Duffy, Burnett, Bergesen & Haakenstad, C. L. Young, R. G. Beede and Karl Baldwin, amici curiae.

CHRISTIANSON, J.:

Plaintiff brought this suit in the district court of Cass County, under the Uniform Declaratory Judgments Act of this state (chap. 237, Laws 1923, Supp. 1925, Sections 7712a1-7712a16), to secure a judicial declaration that certain real property owned by the plaintiff is not subject to the provisions of an initiative measure, adopted June 29th, 1932, entitled "An Act prohibiting corporation farming and

relating to corporations acquiring and holding real estate not necessary in the operation of their business" (Laws 1933, pp. 494, 495), and amended by chap. 89, Laws 1933, and chap. 111, Laws 1935. The Initiative Measure as amended by chap. 89, Laws 1933, reads as follows:

> "That all corporations, both domestic and foreign, except as otherwise provided in this Act, are hereby prohibited from engaging in the business of farming or agriculture." Section 1, Chap. 89, Laws 1933.
>
> "That all corporations, both domestic and foreign, who now own or hold rural real estate, used or usable, for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall dispose of the same within ten years from the date that this Act takes effect, provided that during said ten year period said corporations may farm and use said real estate for agricultural purposes provided further that the ten year limitation provided by this Section shall be deemed a covenant, running with the title to the land against any grantee, successor of (or) assignee of such corporation, which is also a corporation." Section 2, Chap. 89, Laws 1933.
>
> "That any corporation, either domestic or foreign, that acquires any rural real estate, used or usable, for farming or agriculture, by judicial process or operation of law, hereafter, except such as is reasonably necessary in the conduct of its business, shall dispose of such real estate within ten years from the date that it is so acquired, provided that during said ten year period it may farm and use the same for agricultural purposes, provided further that the ten year limitation provided by this Section shall be deemed a covenant, running with the title to the land against any grantee, successor of (or) assignee of such corporation, which is also a corporation." Section 3, Chap. 89, Laws 1933.
>
> "That the title and ownership of any real estate acquired, in any manner, by any domestic or foreign corporation, since the approval and adoption of the aforesaid initiated law, is hereby declared to be legal

and valid for all purposes, notwithstanding any provisions in said initiated law contained, but subject however, to all of the provisions now contained in said initiated law as hereby amended and reenacted." Section 4, Chap. 89, Laws 1933.

"That nothing in this Act shall be construed to prohibit co-operative corporations, seventy-five per cent of whose members or stockholders are actual farmers residing in (on) farms or depending principally on farming for their livelihood, from acquiring real estate and engaging in co-operative farming or agriculture." Section 4, Initiated Measure, Laws 1933, pp. 494, 495.

"That in case any corporation, either domestic or foreign, violates any provisions of this Act and fails within the time fixed by this Act to dispose of any real estate after it has acquired title to same, which is not reasonably necessary for the conduct of its business, then title to such real estate shall escheat to the county in which such real estate is situated upon an action instituted by the State's Attorney of such county, and such county shall within one year dispose of same at public auction to the highest bidder, and the proceeds of such sale, after all expenses of such procedure shall have been paid, shall be paid to the corporation that formerly owned the same." Section 5, Initiated Measure, Laws 1933, pp. 494, 495.

The statute was amended by the legislative assembly in 1935 (Laws 1935, Chap. 111) but the provision amended and the Amendment are not involved here.

The plaintiff in its complaint alleges that it is a nonprofit corporation with perpetual existence, organized under the laws of the state of Minnesota; "that it is a corporation of, and subject to the discipline of the Methodist Episcopal Church and is created and exists for religious and charitable purposes solely; that under the laws of the State of Minnesota said corporation has the power to sue in any court and to acquire by purchase or otherwise, hold, enjoy, improve, lease, encumber and convey real and personal property;" that prior to 1925 the plaintiff became the owner of a certain real estate mortgage upon a quarter

section of land in Cass county, in this state; that on November 27th, 1925, it became the owner of the real property covered by such mortgage, the same having been conveyed to it by the owner in liquidation and satisfaction of the indebtedness secured by the mortgage; that the plaintiff still is the owner in fee simple of such real property; "that the said real property is farming land used and usable for farming and agriculture;" that plaintiff is not engaged in the business of farming and agriculture, but that since the date of acquisition of such property the same has been farmed, by individuals who are residents of North Dakota, under various farm lease contracts; that on the date the said real estate mortgage was acquired by the plaintiff, and on the date that it acquired title to, and ownership of said real property, plaintiff had the right and power, under its articles of incorporation and the laws of Minnesota, to be and become the owner of such mortgage and of said real property; "that at the time and on the date that plaintiff became the owner of said mortgage and of said real estate, there existed in North Dakota no law or statute restricting or forbidding plaintiff's ownership of said mortgage or of said real estate, and that when said mortgage and said real estate were acquired by the plaintiff, plaintiff had the right under the laws of the state of North Dakota as they then existed, to be and become the full, unrestricted and unconditional owner of said mortgage and of said real estate, and to acquire a full, complete, and indefeasible title in and to said property."

The complaint further sets forth the legislative enactments, quoted above, and alleges that the defendant Cass county, the defendant Croal, the duly elected state's attorney of said county, and the defendant Strutz, the duly elected and acting attorney general of the state of North Dakota, unless restrained and enjoined from so doing will enforce such laws and will commence action to the end that the title to such real property shall escheat to the county immediately following July 29th, 1942, in acordance with the provisions of the said initiated measure.

It is further alleged that the plaintiff, since the year 1930, has constantly attempted to sell the real property in question but that it has been unable to sell the same for the

amount of the mortgage originally on it, and that it will be unable to sell the land prior to July 29th, 1942; that any sale which plaintiff might be able to make would be substantially below the amount of money plaintiff has invested therein and that any sale of the property that might be made by the county pursuant to proceedings had under the above mentioned legislative enactments would be for less than the amount of the mortgage and that the cost and expense of such action and of such sale would result in further decreasing any amount that might be received upon sale. It is also alleged "that said real estate above described is not necessary for the conduct of the plaintiff's business, excepting in the following respects: Plaintiff is permitted by the laws of the State of Minnesota to make investments of funds not immediately required for its operations and the ownership of said mortgage or mortgages and the subsequent acquisition of title to the lands covered by said mortgages, represents a legal and lawful function and exercise of one of the powers of the plaintiff as a corporation; that the holding of such surplus funds in such investments is a legal and lawful function and power of plaintiff as a corporation and such investments constitute a part of the conduct of its business."

It is further alleged that application and enforcement of said legislative enactments as against the plaintiff and its said real property would be violative of rights guaranteed to the plaintiff by Section 10 of Article I, Section 2 of Article 4 of the Constitution of the United States, by Section 1 of Article 14 of the Amendments thereto, and by their counterparts (Sections 11, 13, 16 and 20) in the Constitution of North Dakota.

It is further alleged that an actual controversy exists between the plaintiff and the defendants as to the applicability of said legislative enactments to the plaintiff and its said real property and as to whether such legislation, if applicable, is violative of the constitutional rights of the plaintiff under the above mentioned constitutional provisions.

Judgment is asked that the said legislative enactments be adjudged to be not applicable to plaintiff or its said

land, or to any farm lands that were acquired prior to July 29th, 1932, the effective date of such legislation, or to any lands that were acquired subsequent to that date upon the foreclosure of liens or mortgages that were legally effective prior to that date; that if the court adjudge and declare that such legislation is applicable to the plaintiff and to its property so acquired prior to the enactment of such legislation, that in that event the court adjudge that such legislation is unconstitutional and unenforceable, and that the appropriate judgment be entered to prevent the defendants from instituting any action or proceeding against the defendant under the aforesaid legislative enactments.

The defendants interposed a general demurrer. The court sustained the demurrer. In its order the court ruled that "the subject matter of this action and the facts set forth" in the complaint constitute a proper action for a declaratory judgment, but that such facts do not constitute a cause of action so as to entitle plaintiff to any relief against the application and enforcement of the statute against the plaintiff and its land. The order was accompanied by a memorandum opinion wherein the court considered at some length the various contentions advanced by the plaintiff and held: that the statute in question is applicable to the plaintiff corporation and the tract of land described in the complaint; and that the statute is not violative of any of the constitutional provisions invoked by the plaintiff. Plaintiff appeals from the order sustaining the demurrer.

The defendants did not attack the sufficiency of the complaint on the ground that it did not show a controversy properly determinable under the Declaratory Judgments Act. On the contrary, defendants concede that there existed, and still exists, an actual present justiciable controversy between the parties to this action—a controversy involving important and valuable rights affecting the ownership of property belonging to the plaintiff, and that such controversy is properly determinable under the Declaratory Judgments Act. The demurrer was apparently intended to challenge only the validity of the claims of

the plaintiff on the merits of the controversy, namely, the claims of the plaintiff that the provisions of the challenged statute were inapplicable to plaintiff and its real property: First, because the plaintiff and its property were not within the terms of the statute; and, second, that if they were within the terms of the statute that then the statute would be, and is, unconstitutional and void.

The Declaratory Judgments Act provides that courts of record in this State "shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed;" and that "no action or proceeding shall be open to objection on the grounds that a declaratory judgment or decree is prayed for." Supp. 1925, Section 7712a1. It applies to persons "whose rights, status or other legal relations are affected by a statute," and provides that they "may have determined any question of construction * * * arising under the * * * statute * * * and obtain a declaration of rights, status or other legal relation thereunder." Supp. 1925 Section 7712a2. The Act requires that "when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration" (Supp. 1925, Section 7712a11), and that "all orders, judgments, and decrees under this act may be reviewed as other orders, judgments, and decrees" (Supp. 1925, Section 7712a7). The Act "is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." Supp. 1925, Section 7712a12.

The Act is intended to provide a method whereby parties to a justiciable controversy may have such controversy determined by a court in advance of any invasion of rights, or breach of obligation. Nashville, C. & St. L. R. Co. vs. Wallace, 288 U. S. 249, 77 L. Ed. 730, 53 S. Ct. 345, 87 ALR 1191; Currin vs. Wallace, 306 U. S. 1, 83 L. Ed. 441, 59 S. Ct. 379; Kariher's Petition, 284 Pa. 455, 131 A. 265; Borchard, Declaratory Judgments, 2d ed., pp. 280 et seq.; Thompson vs. Chilton Co. 236 Ala. 142, 181 So. 701; Green vs. Inter-Ocean Casualty Co., 203 N. C. 767, 167 S. E. 38; Sigal

vs. Wise, 114 Conn. 297, 158 A. 891, 893; Miller vs. Currie, 208 Wis. 199, 242 N. W. 570, 572. "It is intended to relieve litigants of the rule that no rights may be judicially adjudged until a right has been violated (American Nat. Bank & T. Co. vs. Kushner, 162 Va. 378, 174 S. E. 777) and to authorize judicial action in actual controversies where such action formerly was not available. Holly Sugar Corp. vs. Fritzler, 42 Wyo. 446, 296 P. 206. But an action or proceeding for a declaratory judgment must involve an actual controversy of a justiciable character, between parties having adverse interests. No action or proceeding lies under the Declaratory Judgments Act to obtain a decision which is merely advisory, or which merely determines abstract questions." Langer vs. State, 69 N. D. 129, 141, 284 N. W. 238.

In this case there is an actual controversy of a justiciable character between parties having adverse interests. The question in dispute is not abstract and remote, but real and present. The statute has been in existence for more than nine years. The defendants claim that if plaintiff retains ownership of this property until after July 29th, the property will be subject to the provisions of the statute, and may be sold at public auction pursuant to proceedings had under the statute. The defendants assert that they will institute the action prescribed by the statute to bring this about. The plaintiff claims that the statute cannot be constitutionally applied to such real property, and that it may continue to hold ownership thereof without being subject to the proceedings prescribed by the statute. The uncertainty of plaintiff's tenure naturally will interfere with the operation and especially with the leasing, of the property now. Pierce vs. Society of Sisters, 268 U. S. 510, 69 L. Ed. 1070, 45 S. Ct. 571, 39 ALR 468; Euclid vs. Ambler Realty Co. 272 U. S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 ALR 1016. The trial court was correct in holding that there is presented a cause for determination under the Declaratory Judgments Act. Borchard, Declaratory Judgments, 2d ed. pp. 43, 62, 177, 786, 927, 930, 931, 984, 986. See also Pierce vs. Society of Sisters, and Euclid vs. Amber Realty Co. supra; Nash-

ville, C. & St. L. R. Co. vs. Wallace, supra; Acme Finance Co. vs. Huse, 192 Wash. 96, 73 P. (2d) 341, 114 ALR 1344, and note at pages 1361 et seq.

The plaintiff contends:

(1) That the statute in question here should be construed as applicable only to lands purchased, or acquired upon foreclosure of mortgages that were executed, subsequent to the enactment of the statute; that it should be construed as having no application to lands acquired upon the foreclosure or in liquidation of mortgages executed prior to July 29th, 1932, the effective date of the statute.

(2) That the provision in the statute that land must be disposed of within ten years from the date it was acquired does not apply to a corporation, like the plaintiff, that has authority to acquire, hold and sell real property, or invest its funds in real estate mortgages; that in such case the holding of lands so acquired is necessary in the conduct of the business of the corporation within the purview of the statute.

(3) That if the statute is construed as applicable to the plaintiff and the land in question here, then the statute is unconstitutional because it operates, (a) to impair the obligations of a contract; (b) To deprive plaintiff of vested property rights without due process of law; and (c) it discriminates arbitrarily between two classes of corporations by relieving co-operative corporations, having a membership of a certain class, from the inhibitions placed on other corporations, and that, as a consequence, it infers upon such co-operative corporations privileges that are not granted to others, in violation of Section 20 of the Constitution of this state, and denies to the plaintiff privileges conferred upon co-operative corporations, in violation of Section 20 of the Constitution of this state and of Section 2, Article 4 of the Constitution of the United States; and also denies to plaintiff the equal protection of the laws, in violation of Section 1, Article 14, of the amendments to the Constitution of the United States, and of Section 11 of the Constitution of North Dakota.

These contentions will be considered in the order stated:

(1) The contention that the statute should be construed as not applicable to real property that was acquired prior to July 29th, 1932, or to real property that has been acquired pursuant to the foreclosure of a mortgage that was executed prior to July 29th, 1932, is directly contrary to the language of the statute. It will be noted that Section 2 of the statue, as quoted above, relates to property owned or held by a corporation at the time the statute became effective, and Section 3 relates to real property that is acquired after the statute became effective. This action involves lands that were owned and held by the plaintiff corporation at the time the statute became effective. Section 2 provides: "All corporations, both domestic and foreign, *who now own or hold* rural real estate, used or usable, for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall dispose of the same within ten years from the date that this act takes effect." This language is plain—it requires no construction. This provision was contained in the initiative measure which became effective July 29th, 1932, and retained in the amendatory act enacted by the Legislative Assembly in 1933.

"The legislature must be understood to mean what it has plainly expressed, and this excludes construction. The legislative intent being plainly expressed, so that the act read by itself, or in connection with other statutes pertaining to the same subject, is clear, certain, and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms." 2 Lewis's Sutherland, Stat. Constr. 2d ed. p. 701; State vs. Rother, 56 N. D. 875, 219 N. W. 574. See also Madden vs. Dunbar, 52 N. D. 65, 201 N. W. 988.

(2) The contention that inasmuch as the plaintiff was authorized under its articles of incorporation to acquire and hold real property, the plaintiff and the land in question here fall within the exception in the statute, which authorizes corporations to continue to hold such real estate "as is reasonably necessary in the conduct of their business"

is likewise untenable. This contention sums to this: That the requirement that a corporation dispose of the rural real estate owned by it, used or usable for farming or agriculture, within ten years from the effective date of the Act, does not apply to any real property that was owned by a corporation that had authority under the articles of incorporation to own and hold real property. In other words—according to the contention of the plaintiff the statute would apply only in cases where the owning and holding of real property were ultra vires. The statute is not predicated upon the proposition that the real estate that a corporation is required to dispose of was acquired or is held by the corporation in excess of its charter powers. The statute presupposes that the real estate has been lawfully acquired and is lawfully owned by the corporation. Where a corporation, on the date the statute became effective, owned and held real estate of the character specified in the statute, it is required to dispose of the same within ten years from that date, excepting alone such real estate "as is reasonably necessary in the conduct" of its business. Corporations are organized for the purpose of carrying on and conducting certain specified business or activity. They are granted certain powers to be used to perform the functions for which they are organized. There is an obvious distinction between the objects or business which a corporation is organized to accomplish or conduct and the powers with which it is vested for the purpose of conducting the business or attaining its objects. When the statute provides that there shall be excepted from its operation such real estate "as is reasonably necessary in the conduct of" the business of a corporation, it means such real estate as is reasonably necessary for carrying on the business or activity which the corporation was created to carry on. 6 Fletcher, Cyc. Corp. pp. 170, 171, Section 2475; 17 Fletcher, Cyc. Corp. pp. 471-474; General Conference vs. Berkey, 156 Cal. 466, 105 P. 411; Major Creek Lumber Co. vs. Johnson, 99 Or. 172, 195 P. 177; Alpena Portland Cement Co. vs. Jenkins & R. Co. 244 Ill. 354, 91 N. E. 480; Friedlander Bros. vs. Deal, 218 Ala. 245, 118 So. 508.

In order for a foreign corporation to be "doing business" or "transacting business" in a state—(within the purview of laws imposing conditions on its right to do business in such state)—"there must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created and not merely what the corporation might have authority to do. A distinction, in other words, is to be observed in this connection between the purposes of a corporation and its powers. So the doing of an act which, though within the power of the corporation, is not a part of the business which it was authorized to conduct, is not doing business." 17 Fletcher, Cyc. Corp. pp. 471-474.

In General Conference vs. Berkey, 156 Cal. 486, 105 P. 411, supra, the supreme court of California had occasion to consider a question quite similar to the one under consideration here. The General Conference of Free Baptists was a foreign corporation organized under the laws of Maine. It owned a lot in the city of Sacramento. It sold the lot. The question arose whether the sale of this lot constituted "transacting business" or "doing business" by the General Conference of Free Baptists in the state of California. In the decision in the case, the court said:

> "It remains to be considered, then, whether a sale of real estate by such a corporation is a transaction of business by it within the meaning of the constitutional provision above referred to. The phrase 'to transact business,' as used in this provision, is equivalent to the words 'to do business,' found in the statutes of many states, prohibiting a foreign corporation from 'doing business' in such states until it has filed a certificate designating a place of business and a resident agent upon whom process may be served, or complied with other conditions. * * * "This corporation was certainly not engaged in the business of buying and selling land. As we have said, in another connection, its charter plainly indicates that the power conferred upon it to make such purchase and sale was not granted for the purpose of enabling it to do such acts as a means of making a profit thereon. The buying and selling permitted to it were merely incidental

to the carrying on of the main purposes of the corporation. A distinction is to be drawn between the purposes of a corporation and its powers (Floyd vs. Perrin, 30 S. C. f, 12, 8 S. E. 14, 2 LRA 242). The purposes of the plaintiff, as defined in the articles of incorporation, are 'religious, missionary, educational and charitable.' As incidental to these purposes, it is granted a variety of powers, i. e., the power to prosecute and defend suits at law, the power to use a common seal, the power to take and hold for the objects of said corporation any real or personal property, and the power to sell and convey any estate which the interests of the corporation may require to be sold and conveyed. All of these powers are to be exercised in subordination to the main purposes as first declared. The purchase and sale of property by such a corporation is not one of the ends for which it is organized, but is merely a means to enable it to accomplish those ends. Property is to be acquired only for the objects of the corporation, and to be sold only when the interests of the corporation require such sale. The power to sell property by a corporation of this character is as purely incidental to the prosecution of its main purposes as are the other powers enumerated in the charter, as, for example, the power to prosecute and defend suits at law. It is quite generally held that the mere prosecuting or defending of suits by a foreign corporation is not 'doing business,' within the meaning of statutes of the kind we have been discussing."

The language and reasoning of the California court seem quite applicable here.

According to the allegations of the complaint, the plaintiff was incorporated under the laws of the state of Minnesota, and under the laws of that state it "has the power to sue in any court and to acquire by purchase or otherwise, hold, enjoy, improve, lease, encumber and convey real and personal property." Under the laws of Minnesota, and the articles of incorporation it "is a corporation of, and subject to the discipline of the Methodist Episcopal Church and is created and exists for religious and charitable purposes

solely." The exact business or activity it was created to conduct does not appear, except insofar as this may be inferred from its name, namely,—that it is a hospital. But the "plaintiff is not engaged in the business of farming and agriculture." The real estate which it owns "is farming land used and usable for farming and agriculture," and "since the date of the acquisition of said property by plaintiff the same has been farmed by individuals who are residents of North Dakota, under the terms of various and sundry farm lease contracts upon the usual terms which prevail in the community in which said land is situated." The "said real estate is not necessary for the conduct of the plaintiff's business," except as the investment by the plaintiff of its surplus funds in real estate mortgages, and the subsequent acquisition of lands covered by such mortgages constitute lawful exercise of the corporate powers of the plaintiff, and is a part of the conduct of its business.

The bringing of suits, and the ownership of a tract of rural real estate in this state, rented to individuals "upon the usual terms which prevail in this community in which said land is situated" can hardly be said to constitute solely "religious and charitable" works. The bringing of suits, and the investment of funds (to be utilized in carrying on the religious and charitable work the corporation was created to perform) are but means which the corporation may employ to enable it to do the religious and charitable work for which it was created; but they do not constitute the business or activity which the corporation was created to carry on.

We are agreed that the statute in question here is applicable to the plaintiff and that plaintiff holds the tract of land which it acquired in November, 1925, subject to the provisions thereof. The question therefore presents itself whether the statute as so applied is violative of rights guaranteed to the plaintiff by the provisions of the state and Federal Constitutions which it has invoked. The contention of the plaintiff that the statute, if applied to it and to the tract of land in question, operates to impair the obligations of a contract, to impair plaintiff's vested rights and to deprive it of property without due process of law, are predicated upon the proposition that at the time the

plaintiff became the owner of the land it had a right to acquire the same and there was no such restriction upon its right of ownership, tenure or use, as are prescribed by the challenged statute; and that plaintiff has acquired a vested right to continue to own and enjoy such land in the same manner and to the same extent as was authorized by the laws in force at the time it acquired the land.

A corporation may be created only by authority of the sovereign power. 12 Am. Jur. 175, 234; 18 CJS p. 404. "Corporations are the creations of the state endowed with such faculties as the state bestows and subject to such conditions as the state imposes." 13 Am. Jur. 234. "A corporation can have no legal existence beyond the bounds of the state or sovereignty which created it, and although it may act in another state or country, it cannot do so as a legal or constitutional right but only by the comity and consent of such state or country." 20 CJS p. 12. The Constitution of this State provides that "no charter of incorporation shall be granted, changed or amended by special law, except in the case of such municipal, charitable, educational, penal or reformatory corporations as may be under the control of the state;" but that "the Legislative Assembly shall provide by general laws for the organization of all corporations hereafter to be created and that any such law so passed shall be subject to future repeal or alteration," and that "no foreign corporation shall do business in this State without having one or more places of business and an authorized agent or agents in the same upon whom process may be served." N. D. Const. Sections 131 and 136.

Subject to the constitutional limitations that a State cannot exclude a corporation engaged in interstate commerce, or a corporation that is an agency or instrumentality of the Federal Government (23 Am. Jur. 211-214; 20 CJS pp. 32, 33), "a state may prohibit foreign corporations from doing business therein, or it may make the right to do business depend on such terms and conditions as it may in its discretion see fit to impose." 20 CJS p. 30; 23 Am. Jur. 224, Crescent Cotton Oil Co. vs. Mississippi, 257 US 129, 66 L. Ed. 166, 42 S. Ct. 42; see also Baltic Min. Co. vs. Mas-

sachusetts, 231 US 68, 58 L. Ed. 127, 34 S. Ct. 15; Cheney Bros. Co. vs Massachusetts, 246 US 147, 62 L. Ed. 632, 38 S. Ct. 295; Underwood Typewriter Co. vs Chamberlain, 254 US 113, 65 L. Ed. 165, 41 S. Ct. 45.

"The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta vs Earle, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those State—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." Paul vs Virginia, 8 Wall. 75 (US) 168, 181, 19 L. Ed. 357, 360; Atlantic Ref. Co. vs Virginia, 302 US 22, 26, 82 L. Ed. 24, 28, 58 S. Ct. 75.

"A foreign corporation doing business in a State through comity or acquiescence, or under a license given without valuable consideration, has no contract binding the State not to exercise its powers to exclude it." 23 Am. Jur. 224, see also 20 CJS pp. 31 et seq.; 17 Fletcher, Cyc. Corp. pp. 797 et seq. In such case, the state may repeal at any time a statute granting permission to do such business, and may withdraw or revoke such license, and may withdraw its implied consent to a foreign corporation which has been allowed on principles of comity to engage in business therein without express permission and may evict such corporation, provided its action does not operate to deprive the corporation of its property without due process, obstruct or burden "interstate or foreign commerce, or im-

pede business conducted by Federal authority." 23 Am. Jur. 224, 225; 17 Fletcher, Cyc. Corp. pp. 797, 798; 20 CJS pp. 31 et seq.; National Council vs State Council, 203 US 151, 51 L. Edt 132, 27 S. Ct. 46; Crescent Cotton Oil Co. vs Mississippi, supra. Of course, where a foreign corporation is admitted to a State, not as a mere licensee, but upon terms and conditions which create a contract between the corporation and the state, the state may not impair the obligations of such contract. But, even where there may be said to be a contract between the state and a foreign corporation, the State may have reserved the power to alter the conditions on which the corporation is permitted to do business, or to revoke the right to do business in the State at all. 23 Am. Jur. 223.

The right and capacity of a corporation to acquire and own real estate is frequently expressly limited. 6 Fletcher, Cyc. Corp. pp. 670-681.

"Very often, too, there are provisions in the constitutions or statutes which directly or by necessary implication require surplus or unnecessary property to be disposed of by the corporation, within a fixed period of time such as five years, or six years, or ten years, or some other designated number of years." 6 Fletcher, Cyc. Corp. pp. 681, 682.

Some states, by constitutional or statutory provisions, have prohibited foreign corporations from acquiring and holding real property within their limits, or have restricted the right to acquire such property to the purchase thereof at a judicial sale for the purpose of collecting or enforcing a lien or judgment in favor of the corporation, 17 Fletcher, Cyc. Corp. pp. 173, 174; Com. ex rel. Atty. Gen. vs. New York, L. E. & W. R. Co. 114 Pa. 340, 7 A. 756; Wash. Const. Art. 2, Sec. 33; Ky. Const. Sec. 192; German Ins. Co. vs. Com. 141 Ky. 606, 133 S. W. 793; First Nat. Bank vs. Com. 143 Ky. 816, 137 S. W. 518; Com. vs. Clark County Nat. Bank, 187 Ky. 151, 219 S. W. 175; Okla. Const. Art. 22, Sec. 2; Okla. Sess. Laws 1907-1908, pp. 196, 197; State vs. Prairie Oil & Gas Co. 64 Okla. 267, 167 P. 756; Wolfe vs. State, 163 Okla. 180, 21 P. (2d) 1067; Neb. Comp. Stat. 1922, Sections 5687, 5690; Lord vs. Schultz, 115 Neb. 33, 211 N. W. 210, 489.

See also S. D. Const. Sec. 7, Art. 17; State ex rel. Chamberlain vs. Hutterische Bruder Gemeinde, 46 S. D. 189, 191 N. W. 635; Groo vs. Norman & Robinson, 42 App. D. C. 387, 388, 389; Puerto Rico vs. Rubert Hermanos, Inc., 309 U. S. 543, 84 L. Ed. 916, 60 S. Ct. 699.

"Foreign corporations enter a state and transact business therein only with that state's consent, express or implied. It may exclude them entirely, or impose whatever restrictions or conditions it sees fit, provided in so doing it does not violate any provisions of the Federal Constitution or laws. Particularly is this true with reference to real property rights and transactions. For each state has the power, uncontrolled by another, to establish rules regulating the tenure of lands lying within its limits, and the manner of buying and selling them by persons and corporations under its jurisdiction. And a state may, by statute, expressly prohibit foreign corporations from acquiring and holding real property within its limits, or impose such conditions and restrictions upon the right as it may see fit." 17 Fletcher, Cyc. Corp. pp. 173, 174; Munday vs. Wisconsin, 252 U. S. 499, 64 L. Ed. 684, 40 S. Ct. 365.

Where interstate commerce is not directly affected, a state has the power to exclude all foreign corporations, except such as are agencies or instrumentalities of the Federal Government (Phillips Petroleum Co. vs. Jenkins, 297 U. S. 629, 634, 80 L. Ed. 943, 947, 56 S. Ct. 611); and a state has the power to prohibit any foreign corporation, which it might exclude from the state, from acquiring real property in the state for any purpose (17 Fletcher, Cyc. Corp. 173, 174), even through conveyances executed and delivered in another state. Munday vs. Wisconsin, supra. The state might have refrained from enacting laws providing for organization of corporations for any purpose (Phillips Petroleum Co. vs. Jenkins, 297 U. S. at p. 634, 80 L. Ed. at p. 947, 56 S. Ct. 611) or having enacted laws providing for organization of corporations, it might later alter, suspend, or repeal such laws, provided, that in so doing the state observed the constitutional requirements of due process and equal protection of the law, and did not lay a burden upon, or interfere with, interstate commerce, or with corporate

agencies or instrumentalities of the Federal Government. N. D. Const. Sec. 131; Comp. Laws 1913, Sec. 4495; Tomlinson vs. Jessup, 15 Wall. 82 (U. S.) 454, 21 L. Ed. 204; Greenwood vs. Union Freight R. Co. 105 U. S. 13, 26 L. Ed. 961; Missouri P. R. Co. vs. Kansas, 216 U. S. 262, 54 L. Ed. 472, 30 S. Ct. 330; Calder vs. Michigan, 218 U. S. 591, 54 L. Ed. 1163, 31 S. Ct. 122; Polk vs. Mutual Reserve Fund Life Asso. 207 U. S. 310, 52 L. Ed. 222, 28 S. Ct. 65; International Bridge Co. vs. New York, 254 U. S. 126, 65 L. Ed. 176, 41 S. Ct. 56; Ft. Smith Light & Traction Co. vs. Board of Improvement, 274 U. S. 387, 71 L. Ed. 1112, 47 S. Ct. 595; Phillips Petroleum Co. vs. Jenkins, supra.

Where there is a reservation in the state Constitution of power to alter, suspend or repeal all laws, providing for organization of corporations—such as there is in the Constitution of this state—this reservation becomes a part of the charter of the corporation (6 Fletcher, Cyc. Corp. Sections 823-825), and it is beyond the power of the legislature to confer upon corporations powers that are not subject to abrogation or change pursuant to the legislative power so reserved. Missouri P. R. Co. vs. Kansas, supra; Texas & N. O. R. Co. vs. Miller, 221 U. S. 408, 414, 55 L. Ed. 789, 795, 31 S. Ct. 534; Phillips Petroleum Co. vs. Jenkins, supra. Where there is a constitutional reservation of continued legislative power (such as in Sec. 131 of the Constitution of this state) the matter of the organization of corporations, and the powers to be granted to and exercised by them are subjects of general governmental policy which one legislative assembly may not bargain away or withdraw from the constitutional law-making function of a succeeding legislature. Missouri P. R. Co. vs. Kansas, supra, and Texas & N. O. R. Co. vs. Miller, supra. Obviously, permission or authorization to foreign corporations to enter and do business in the state is no more withdrawn from legislative action than are the charters of domestic corporations. Connecticut Mut. L. Ins. Co. vs. Spratley, 172 U. S. 602, 620-622, 43 L. Ed. 569, 575, 576, 19 S. Ct. 308; Phillips Petroleum Co. vs. Jenkins, supra, 297 U. S. at page 635, 80 L. Ed. at page 948, 56 S. Ct. 611; Waters-Pierce Oil Co. vs. Texas, 177 U. S. at pages 43-47, 44 L. Ed. at pages 664, 665, 20 S. Ct. 518; 23 Am. Jur. 296-298.

The plaintiff had no express permission to acquire and hold real estate in the state. All activities incident to the acquisition of the real estate in question here and the use and enjoyment thereof were had as a matter of comity. "Comity is a matter of favor and not of right." A state "may by statute modify or withdraw such comity towards a corporation created by, or existing under the laws of another state or sovereign, provided the modification does not come in conflict with the paramount laws of the United States." 17 Fletcher, Cyc. Corp. Sec. 8333, pp. 131-135. It goes without saying that the plaintiff has no greater rights than if it had qualified under the laws relating to the admission of foreign corporations; and mere permission to carry on any activity or to acquire property within the state does not create a contract which will preclude the state from subsequently restricting the power of foreign corporations to acquire and hold real property, provided that in making such restriction, the state does not deprive the corporation or its stockholders of property without due process or deny the equal protection of the laws. The permission to do business, whether express or implied, does not constitute a contract or create a vested right to continue to hold the property, without restrictions other than those which existed at the time it was acquired. Such permission constitutes a license which the state subsequently may abrogate or change, if in so doing there is no deprival of property without due process or denial of equal protection of the laws.

In considering the nature of an authorization by a state to a foreign corporation to do business, and the power of the state to alter or abrogate such authorization, in Connecticut Mut. L. Ins. Co. vs. Spratley, 172 U. S. 602, 43 L. Ed. 569, 19 S. Ct. 308, supra, the Supreme Court of the United States said:

"Instead of a contract, it was a mere license given by the state to a foreign corporation to do business within its limits upon complying with the rules and regulations provided for by law. That law the state was entirely competent to change at any time by a subsequent statute without being amenable to the charge that such subsequent statute

impaired the obligation of a contract between the state and the foreign corporation doing business within its borders under the former act.

"Statutes of this kind reflect and execute the general policy of the state upon matters of public interest, and each subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify the act granting such permission, making proper provision when necessary in regard to the rights of property of the company already acquired, and protecting such rights from any illegal interference or injury. Douglas vs. Kentucky, 168 U. S. 488, 42 L. Ed. 553, 18 S. Ct. 199. The cases showing the right of a state to grant or refuse permission to a foreign corporation of this kind to do business within its limits are collected in Hooper vs. California, 155 U. S. 648, at 652, 39 L. Ed. 297, at 299, 15 S. Ct. 207, 5 Inters. Com. Rep. 610.

"Having the right to impose such terms as it may see fit upon a corporation of this kind as a condition upon which it will permit the corporation to do business within its borders, the state is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed itself of the right given by the state, but it may alter them at its pleasure. In all such cases there can be no contract springing from a compliance with the terms of the act, and no irrepealable law, because they are what is termed 'governmental subjects,' and hence within the category which permits the legislature of a state to legislate upon those subjects from time to time as the public interests may seem to it to require.

"As these statutes involve public interests, legislation regarding them are necessarily public laws, and as stated in Newton vs. Mahoning County, 100 U. S. 548, at 559, 25 L. Ed. 710, at 711:

"'Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equal-

ity. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.'" Connecticut Mut. L. Ins. Co. vs. Spratley, 172 U. S. at pages 620-622, 43 L. Ed. pp. 575, 576, 19 S. Ct. 308.

As has been pointed out, there are constitutional or statutory provisions in many states restricting the right of corporations to acquire and hold real estate and requiring that such corporations dispose of real estate which they have acquired, within a fixed period of time.

No instance has been called to our attention, and none has been found, where such legislation was predicated upon the proposition that the State was without power to require a corporation to dispose of real property that it had acquired before the statute or constitutional provision became effective; and in some of the states, the legislation restricting the right of corporations to hold real property is specifically made applicable as well to property that had been acquired before the legislation became effective as to property subsequently acquired. Okla. Const. Art. 22, Sec. 33, and Session Laws 1907-08, p. 197; Neb. Comp. Stat. 1922, Sections 5687, 5690; Ky. Const. Sec. 192; Com. vs. Clark County Nat. Bank, 187 Ky. 151, 219 S. W. 175. See also Puerto Rico vs. Rubert Hermanos, Inc. 309 U. S. 543, 84 L. Ed. 916, 60 S. Ct. 699; State vs. Prairie Oil & Gas Co. 64 Okla. 267, 167 P. 756; Wolfe vs. State, 163 Okla. 180, 21 P. (2d) 1067; State ex rel. Collins vs. Crescent Cotton Oil Co. 116 Miss. 398, 77 So. 185; Crescent Cotton Oil Co. vs. State, 121 Miss. 615, 83 So. 680; Crescent Cotton Oil Co. vs. Mississippi, 257 U. S. 129, 66 L. Ed. 166, 42 S. Ct. 42. In Com. vs. Clark County Nat. Bank, 187 Ky. 151, 219 S. W. 175, supra, it was contended that inasmuch as the land sought to be escheated had been acquired by the corporation before the adoption of the constitutional provision, "the corporation had a vested right which was unaffected by the adoption" of the new constitution containing the provision as "there could

be no impairment of the obligation of contract or rights acquired or vested before the making of the law."

The court of appeals of Kentucky held that the constitutional provision and the statutes enacted pursuant thereto were applicable to lands that had been acquired by a corporation prior to the adoption of the Constitution and the enactment of the statutes, and that the enforcement of such constitutional and statutory provisions against lands which a corporation had acquired prior to the adoption of the Constitution and enactment of the statute did not result in "unconstitutionally" impairing "the contract or vested rights" of the corporation.

We think it clearly follows from the principle announced by the Supreme Court of the United States in Connecticut Mut. L. Ins. Co. vs. Spratley, 172 U. S. 602, 43 L. Ed. 569, 19 S. Ct. 308 supra, and Phillips Petroleum Co. vs. Jenkins, 297 U. S. 629, 80 L. Ed. 943, 56 S. Ct. 611, supra, that the provisions of the statute in question here restricting the power of the plaintiff to hold real estate, used or usable for farming or agriculture, and requiring it to dispose of the same within ten years from the date the act took effect, do not impair the obligations of any contract between the State and the plaintiff, or impair any vested property right of the plaintiff.

The question next presents itself whether such provisions operate to deprive the plaintiff corporation of its property without due process of law. This question must be answered in the negative. The state having the right to restrict the power of the plaintiff and corporations similarly situated as to the acquisition and ownership of real estate within the state, it naturally follows that any legislation which it might enact to carry such policy into effect must have a beginning, and "the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning." Sperry & H. Co. vs. Rhodes, 220 U. S. 502, 55 L. Ed. 561, 31 S. Ct. 490. Of course, the state could not put its new policy into effect in such sudden and arbitrary manner as to practically sacrifice and confiscate the interest of the corporation in the property that it had been

permitted to acquire within the State. In making the change it must give the corporation reasonable time in which to dispose of its property. 17 Fletcher, Cyc. Corp., p. 799. See also State ex rel. Collins vs. Crescent Cotton Oil Co., 116 Miss. 398, 77 So. 185; Crescent Cotton Oil Co. vs. State, 121 Miss. 615, 83 So. 680; Crescent Cotton Oil Co. vs. Mississippi, 257 U. S. 129, 66 L. Ed. 166, 42 S. Ct. 42. The statute gives to corporations like the plaintiff, who held rural real estate at the time the statute became effective, ten years in which to dispose of it before such property becomes subject to the provisions of the statute providing for disposal of the property under the procedure provided by the statute. Clearly the period of time provided by the statute cannot be said to be so unreasonable or arbitrary as to operate to deprive corporations holding land subject to the statute of property without due process of law. See State ex rel. Collins vs. Crescent Oil Co.; Crescent Oil Co. vs. State, and Crescent Oil Co. vs. Mississippi, all supra. Such period is considerably longer than that prescribed in analogous laws in other states. Thus, Oklahoma prescribes seven years, and Kentucky five years (Okla. Const. Art. 22, Sec. 33, and Session Laws 1907-08; Ky. Const. Sec. 192; Com. vs. Clark County Nat. Bank, 187 Ky. 151, 219 S. W. 175), and under the Oklahoma and Kentucky laws the corporation receives no part of the proceeds of the sale of lands escheated to the state, but the lands and proceeds of sale thereof become the property of the state.

Appellant contends, however, that the economic depression which existed at the time the statute was enacted, and which continued thereafter, operated to depress the market value of lands in such degree as to render it practically impossible for corporations to dispose of their lands at anything like their actual value within the ten-year period, and that consequently the application of the statute will deprive the plaintiff and other corporations owners of land similarly situated of property without due process. The contention and the argument in support of it involve the wisdom and justice of the law; but do not show that the law is violative of the constitutional provisions upon which plaintiff relies. The validity of a statute must be deter-

mined solely by whether it is within the purview of legislative powers as limited by the Federal and state Constitutions. 11 Am. Jur. 803; 16 CJS pp. 471 et seq.; State ex rel. Linde vs. Taylor, 33 N. D. 76, 156 N. W. 561, LRA-1915B, 156. The justice, wisdom, necessity, utility or expediency of a law which is within their powers are for the lawmakers. 11 Am. Jur. 803, 804 et seq., 16 CJS pp. 471 et seq.

A court has no power to declare a statute invalid on the ground of unjust and oppressive provisions, unless such provisions contravene the state or Federal Constitution. "The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance." 1 Cooley, Const. Lim. 8th ed. p. 345. "The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the people themselves, or their legislative representatives." Lommen vs. Minnesota Gaslight Co., 65 Minn. 196, 208, 68 N. W. 53, 54. "The judiciary can only arrest the execution of a statute when it conflicts with the Constitution." 1 Cooley, Const. Lim. 8th ed., pp. 341, 345. See also Billings vs. Illinois, 188 U. S. 97, 102, 47 L. Ed. 400, 403, 23 S. Ct. 272.

It is contended, however, that the procedure prescribed by the statute to effect the escheat fails to conform to the requirement of due process. This contention cannot be sustained. The statute does not purport to divest a corporation of title to land which it holds beyond the prescribed period. It makes such holding the ground for an action to effect the escheat; but the corporation continues to own and hold the property until title thereto is divested by judgment rendered in the action brought pursuant to the statute. 19 Am. Jur. 399, Sec. 33. The corporation must be made a party to the action. It will have full opportunity to be heard in defense. It goes without saying that judgment to effect escheat may be rendered only if the cause of action is established. If the cause is established and judgment to effect escheat rendered, the county must dispose of the land within one year "at public auc-

tion to the highest bidder" and the proceeds of the sale, after payment of expenses of the action and of the sale, must be paid to the corporation. It is true the statute does not prescribe the form of notice of sale, or the manner of publication thereof; but it does require sale to be made within a year, and that the sale be a public one. (The sale is predicated upon the judgment effecting the escheat.) The corporation has a direct interest in the sale, and the court has the power to protect the rights of the corporation as to the notice and conduct of the sale, by appropriate provisions in its judgment. Greenwood vs. Union Freight R. Co., 105 U. S., (15 Otto) at page 19, 26 L. Ed. at page 964; Church of Jesus Christ of L. D. S. vs. United States, 136 U. S. 1, 34 L. Ed. 478, 10 S. Ct. 792.

Plaintiff contends that the statute makes a purely arbitrary and unreasonable discrimination against all general corporations, and in favor of certain cooperative corporations, in contravention of the provision of the Fourteenth Amendment to the Constitution of the United States that "no state shall * * * deny to any person within its jurisdiction the equal protection of the laws" and of the requirement of Sec. 11 of the Constitution of North Dakota that "all laws of a general nature shall have a uniform operation."

The contentions cannot be sustained. In passing, it should be noted that it is at least doubtful whether the "equal-protection-of-the-laws" clause of the Fourteenth Amendment may be invoked by the plaintiff. The inhibition in that clause relates only to persons *within the jurisdiction* of the State. The plaintiff has not rendered itself subject to suit in the courts of this state. In Blake vs McClung, 172 US 239, 43 L. Ed. 432, 19 S. Ct. 187, the Supreme Court of the United States held: "A corporation not created by the laws of a state, nor doing business in that state under conditions that subject it to process from the courts of that state, is not within the jurisdiction of that state, within the meaning of the constitutional provision that no state shall deny to any person within its jurisdiction the equal protection of the laws." (Syllabus 6), Blake vs McClung, 43 L. Ed. 432.

The rule announced in Blake vs McClung, supra, seems to have been qualified to some degree in Kentucky Finance Corp. vs Paramount Auto Exch. Corp. 262 US 544, 67 L. Ed. 1112, 43 S. Ct. 636. We deem it unnecessary to determine the effect of this latter decision upon the rule announced in Blake vs McClung, for we are agreed that the statute does not violate any rights that are or would be guaranteed to the plaintiff by the "equality-of-the-laws" clause of the Fourteenth Amendment or the "uniformity of operation" requirement of Sec. 11 of the state Constitution. Neither the equality-of-the-laws clause in the Fourteenth Amendment nor the uniformity of operation requirement of Sec. 11 of the state Constitution forbids classification. 12 Am. Jur. pp. 140 et seq.; 59 CJ pp. 722 et seq.; Brown vs Steckler, 40 N. D. 113, 168 N. W. 670, 1 ALR 753; Peterson vs Panovitz, 62 ND. 328, 243 N. W. 798, 84 ALR 1290; Bratberg vs Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 ALR 1290.

"Classification is primarily for the legislature which has a wide discretion in respect thereof, and in determining its constitutionality, judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it is so lacking in any reasonable basis as to be arbitrary." 16 CJS pp. 1001, 1002.

Obviously, the inherent differences between corporations and natural persons are sufficient to justify classification whereby, for many purposes, corporations are put in one classification and individuals in another. 12 Am. Jur. 199, Constitutional Law; Crescent Cotton Oil Co. vs Mississippi, 257 US 129, 66 L. Ed. 166, 42 S. Ct. 42, supra. So, likewise, corporations "may, within reasonable limits, be divided into classes, and each class given such rights, capacities and powers as the legislature may see fit." 12 Am. Jur. 197, Constitutional Law. Thus, the exempting by the legislature of farmers' mutual insurance companies, organized and doing business under the laws of the State and insuring only farm property, from the regulations of fire insurance rates imposed upon other insurance companies, does not deny to the corporations subjected to such regulations the equal protection of the laws. German Alliance Ins. Co. vs. Lewis, 233 US 389, 58 L. Ed. 1011, 34 S. Ct.

612; LRA 1915C 1189. See also State ex rel. Linde vs Taylor, 33 N. D. 76, 108, 156 N. W. 151, LRA1918A 156, Ann. Cas. 1918A 583. And, the legislature may, without violating the constitutional guaranty of equal protection of the laws, discriminate between life and casualty companies in restricting the period to which such companies may, by agreement, limit the bringing of suits on their contracts. Metropolitan Casualty Ins. Co. vs Brownwell, 294 US 580, 79 L. Ed. 1070; 55 S. Ct. 538.

The distinctions between general corporations and co-operatives have been held repeatedly to justify classification, and "different treatment" as to each of such classes. United States vs Rock Royal Cooperative, 307 US 533, 563, 83 L. Ed. 1446, 1464, 59 S. Ct. 993; Northern Wisconsin Co-op. Tobacco Pool vs Bekkedal, 182 Wis. 571, 197 N. W. 936, 945; Chaffee vs Farmers' Coop. Elevator Co. 39 N. D. 585, 168 N. W. 616. See also Brown vs Steckler, 40 N. D. 113, 168 N. W. 670, 4 ALR 753, supra; Northwestern Mut. L. Ins. Co. vs Wisconsin, 247 US 132, 62 L. Ed. 1025, 38 S. Ct. 444; Orient Ins. Co. vs Daggs, 172 US 557, 43 L. Ed. 552, 19 S. Ct. 281.

The statute in question here authorizes co-operative corporations to acquire real estate and engage in co-operative farming or agriculture, and denies the power to so do to corporations organized under the general corporation laws. We are agreed that in so doing the legislature did not make such arbitrary or unreasonable discrimination as to constitute a denial of the equal protection of the laws or violate the requirement that all laws of a general nature shall have a uniform operation. In short, we believe there is a reasonable basis for the classification made.

The plaintiff contends, however, that, in any event, the provision which limits the right to acquire real estate and engage in farming or agriculture to co-operative corporations, 75 per cent of whose members or stockholders are actual farmers or residing on farms or depending principally on farming or agriculture for their livelihood, is an arbitrary or unreasonable classification and violative of the principle of equal protection of the laws. This question is not involved and may not properly be considered here. It is an elementary rule repeatedly announced with practical

unanimity by the courts of this country, including the Supreme Court of the United States and this court, that a person can question the constitutionality of a statute only when and insofar as it is sought to be applied to his disadvantage. Rindge Co. vs. Los Angeles County, 262 US 700, 67 L. Ed. 1186, 43 S. Ct. 689; Minot Special School Dist. vs Olsness, 53 N. D. 683, 696, 208 N. W. 968, 45 ALR 1337; Premier-Pabst Sales Co. vs Grosscup, 298 US 226, 80 L. Ed. 1155, 56 S. Ct. 754; Henneford vs Silas Mason Co. 300 US 577, 81 L. Ed. 814, 57 S. Ct. 524; 16 CJS pp. 161, 162. "One attacking the constitutionality of a statute is not the champion of any rights except his own." Henneford vs Silas Mason Co. supra.

"One may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right." 16 CJS pp. 161, 162.

In Premier-Pabst Sales Co. vs Grosscup, supra, the Supreme Court of the United States said: "We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconsitutional feature injures him."

The plaintiff is not a co-operative corporation. It is not engaged in farming or agriculture. It cannot be injured by the provisions of the statute which discriminates in favor of co-operative corporations "75 per cent of whose members or stockholders are actual farmers, residing on farms or depending principally on farming for their livelihood," and against co-operative corporations 75 per cent of whose members or stockholders are not "actual farmers, residing on farms or depending principally on farming for their livelihood." According to the allegations of the plaintiff's complaint, injury is threatened to it only under the provisions which required corporations who had acquired rural real estate, used or usable for farming, at or prior to the

effective date of the statute, to dispose of such real estate within ten years thereafter.

The plaintiff also contends that the statute is violative of Sec. 2 of Article 4 of the Constitution which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This contention is clearly devoid of merit. It is settled beyond controversy that a corporation is not a citizen within the meaning of Sec. 2 of Article 4, of the Federal Constitution or of Sec. 1 of Article 14 of the Amendments to the Federal Constitution as to the privileges and immunities of citizens. Orient Ins. Co. vs. Daggs, 172 U. S. 557, 43 L. Ed. 552, 19 S. Ct. 281, supra; Waters-Pierce Oil Co. vs. Texas, 177 U. S. 28, 45, 44 L. Ed. 637, 664, 20 S. Ct. 518; 12 Am. Jur. 100, 23 Am. Jur. 259, 8 Fletcher, Cyc. Corp. p. 449.

It follows from what has been said that the order appealed from is correct. It must be and it is affirmed. The case is remanded to the district court for further proceedings conformable to law.

A. M. CHRISTIANSON,
JAMES MORRIS,
W. L. NUESSLE,
THOMAS J. BURKE,
HARVEY J. MILLER,
District Judge.

Burr, J., being disqualified, did not participate, Hon. Harvey J. Miller, Judge of Sixth Judicial District, sitting in his stead.

APPENDIX "B"

IN THE SUPREME COURT, STATE OF NORTH DAKOTA

ASBURY HOSPITAL, a Corporation, *Plaintiff and Appellant,*

vs.

CASS COUNTY, NORTH DAKOTA, a Public Corporation, R. F. CROAL as States Attorney of Cass County, North Dakota, and his successors in office, and ALVIN C. STRUTZ as attorney general of the State of North Dakota and his successors in office; *Defendants* and *Respondents.*

Following Asbury Hospital v. Cass County, 72 N. D. 359, 7 N. W. 2d. 438, it is *held* that the application of the provisions of Initiative Measure, adopted June 29, 1932 (Laws 1933, pp. 494, 495), as amended by Laws 1933, Chap. 89, and Laws 1935, Chap. 111, to the plaintiff and lands owned by it in North Dakota, does not operate to infringe upon or deny to the plaintiff any rights guaranteed to it by Sec. 10, Article 1, Sec. 2, Article 4, the Fifth Amendment, and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, or by Sections 11, 13, 16, 20 and 22 of the Constitution of North Dakota.

(Syllabus by the Court)

Action for a declaratory judgment by Asbury Hospital, a corporation, against Cass County, R. F. Croal, as State's Attorney of Cass County, and his successors in office, and Alvin C. Strutz, as Attorney General, and his successors in office, to secure a judicial declaration that certain real property owned by the plaintiff in Cass County is not subject to the provisions of an initiative measure, adopted June 20, 1932, entitled "An Act prohibiting corporation farming and relating to corporations acquiring and holding real estate not necessary in the operation of their business."

Appeal from a judgment of the District Court of Cass County, Hon. P. G. Swenson, Judge.

Affirmed.

Opinion of the Court by Christianson, J.

Messrs. Nilles, Oehlert and Nilles of Fargo (Abbot L. Fletcher of Minneapolis of counsel), attorneys for Plaintiff and Appellant.

Messrs. Alvin C. Strutz, attorney general, William R. Pearce, special assistant attorney general, both of Bismarck, and R. F. Croal, state's attorney, of Fargo, attorneys for defendants and respondents.

Asbury Hospital v. Cass County

Christianson, J. This is a sequel to Asbury Hospital v. Cass County, 72 N. D. 359, 7 N. W. 2d 438. The former appeal involved an order sustaining a demurrer to the complaint. The order was affirmed. The action was brought in the District Court of Cass County under the Uniform Declaratory Judgments Act of this state (Chap. 237, Laws 1923, 1925 Supp. secs. 7712a1-7712a16), to secure a judicial declaration that certain real property owned by the plaintiff is not subject to the provisions of an initiative measure, adopted June 29, 1932, entitled "An act prohibiting corporation farming and relating to corporations acquiring and holding real estate not necessary in the operation of their business." (Laws 1933, pp. 494, 495,) and amended by chap. 89, Laws 1933, and chap. 111, Laws 1935.

The plaintiff is a nonprofit corporation organized under the laws of the state of Minnesota and the owner of certain land in Cass County in this state which it acquired in November 1925. The facts are set forth fully in the former opinion and need not be restated here.

In its complaint the plaintiff alleged that application of the statute in question here as against the plaintiff and its said real estate would infringe upon the violate rights guaranteed to it by Article 1, Section 10, Article 4, Section 2, and the Fifth Amendment and Section 1 of the Fourteenth Amendments to the Constitution of the United States, as well as Sections 11, 13, 16, 20 and 22 of the Constitution

of North Dakota. On a former appeal these constitutional questions were raised and were decided by the decision of this court. On this appeal, plaintiff by appropriate assignments of error has presented the same constitutional questions and they have been supported and argued both in the written briefs and on the oral argument.

After the case had been remanded to the district court, following the decision on the former appeal, the trial court made findings of fact, wherein it found the facts alleged in the amended complaint to be true. From the facts so found the court drew the following Conclusions of Law:

"1. This action was properly brought for a declaratory judgment under the Declaratory Judgments Act of this State and the facts present an actual controversy of a justiciable character between the parties having adverse interests.

2. The initiated statute of North Dakota (Laws 1933, p. 494, Sections 4 and 5, and Sections 1 and 3, as amended by Laws 1933, c. 89) requiring corporations to dispose of realty usable for agriculture, may be constitutionally applied to realty acquired before the adoption of the statute, or acquired by foreclosure of mortgage executed before the adoption of the statute.

3. Plaintiff was not brought within the statutory exception authorizing corporations to continue to hold realty usable for agriculture if 'reasonably necessary in the conduct of their business' merely because its articles of incorporation authorized it to acquire and hold realty.

4. The enforcement of said initiated measure of North Dakota against the plaintiff, would not deprive the plaintiff of its property without due process of law, or deny to it the equal protection of the law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

5. Said initiated measure does not operate to impair the obligation of contract between the State and the plaintiff or impair or divest any vested property

right, and within the meaning of the Fourteenth Amendment of the Constitution of the United States and within the meaning of Article 4, Section 2 thereof.

6. The Fourteenth Amendment of the Constitution of the United States prohibits denial of equal protection of the laws only to persons within the jurisdiction of the State, and cannot be relied upon by the plaintiff in this case.

7. Plaintiff is not a citizen within the meaning of Article 4, Section 2 of the Constitution of the United States governing privileges and immunities of citizens.

8. Plaintiff could not be injured by the amendment to said law discriminating in favor of corporations as defined therein, and hence cannot urge such discrimination in claiming such statute to be unconstitutional.

9. Said initiated measure, as against the plaintiff, is not in contravention of any of the provisions of the Constitution of the United States or amendments thereto, set forth in the bill of complaint herein; neither is said legislation in violation of or in contravention of any of the provisions of the Constitution of the State of North Dakota relied upon by the plaintiff in the bill of complaint.

10. This Court having assumed jurisdiction of this case as one properly brought for a declaratory judgment and for injunctive relief, and having declared the law, now does, in accordance with such declaration, deny plaintiff's application for perpetual injunction against the defendants, prohibiting defendants and their successors in office from enforcing or attempting to enforce such legislation against the plaintiff's property."

Final judgment was entered in accordance with the findings and the conclusions and the plaintiff has appealed.

The facts is found by the trial court are precisely the same as those set forth in the complaint, which was considered on the former appeal. The same contentions were advanced on that appeal that are advanced on this appeal.

While the former appeal was from an intermediate order (Comp. Laws 1913, sec. 7832; Deveraux v. Katz, 22 N. D. 351, 133 N. W. 553; Langer v. The Courier News, 48 N. D. 280, 183 N. W. 1009) and this is an appeal from a final judgment, the decision on the former appeal became and is the law of the case. 5 C. J. S. p. 1267, et seq; Schmidt v. Beiseker, 19 N. D. 35, 120 N. W. 1096; Stimson v. Stimson, 30 N. D. 78, 152 N. W. 132; Dubs v. Northern Pacific Railway Company, 51 N. D. 113, 199 N. W. 191; Wittmayer v. Security State Bank of Upham, 57 N. D. 934, 224 N. W. 303; Anderson v. Northern & Dakota Trust Company, 67 N. D. 458, 484-485, 274 N. W. 127, 140; Pearce v. North Dakota Workmen's Compensation Bureau, 68 N. D. 318, 279 N. W. 601; Jacobson v. Mutual Benefit Health & Accident Assn., 70 N. D. 566, 296 N. W. 545.

In the decision on the former appeal, we held that the statute in question was applicable to the plaintiff and its real estate, and that the application and enforcement of the statute against the plaintiff as to the tract of land in question here will not operate to infringe upon or deny any right guaranteed to it by the several provisions of the Constitution of the United States and the Constitution of the State of North Dakota which it has invoked. We adhere to the views expressed and the principles announced in the decision on the former appeal and the determination there made of the several contentions that were advanced by the plaintiff on that appeal and that are advanced against on this appeal.

The judgment appealed from is affirmed.

A. M. Christianson,
W. L. Nuessle,
Thomas J. Burke,
James Morris,
Harvey J. Miller.
District Judge.

Mr. Justice Burr, deeming himself disqualified, did not participate, Hon. Harvey J. Miller, Judge of Sixth Judicial District, sitting in his stead by request.

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 35

ASBURY HOSPITAL, A CORPORATION,
APPELLANT

vs.

CASS COUNTY, NORTH DAKOTA, A PUBLIC CORPORATION, R. F. CROAL, AS STATE'S ATTORNEY OF CASS COUNTY, NORTH DAKOTA, ET, AL.,

APPELLEES

BRIEF OF APPELLANT

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 35

ASBURY HOSPITAL, A CORPORATION
APPELLANT,

-vs-

CASS COUNTY, NORTH DAKOTA, A PUBLIC CORPORATION, ET AL.
APPELLEES.

BRIEF OF APPELLANT

OPINIONS DELIVERED BY THE COURT BELOW.

Two opinions were delivered by the North Dakota Supreme Court; the first, upon an appeal from a demurrer (which is an intermediate order under North Dakota law) will be found reported as Asbury Hospital vs. Cass County, et al., 72 N.D. 359, 7 N.W. (2d) 438 (R. 29); upon appeal from the final judgment of the District Court of Cass County, the North Dakota Supreme Court delivered another opinion which will be found reported as Asbury Hospital vs. Cass County, et al., ___ N.D. ___, 16 N.W. (2d) 513 (R. 59).

JURISDICTION

A complete Jurisdictional Statement has heretofore been printed and filed, and this Court, on March 5th, 1945, noted probable jurisdiction and transferred the cause to the Summary Docket (R. 67).

Jurisdiction is based upon Section 237 (a) of the United States Code. Briefly, the Supreme Court of North Dakota, the highest court of that State, has held that a certain Initiative Measure adopted by the people of that State, on June 29th, 1932, entitled "An Act prohibiting corporation farming, and relating to corporations acquiring and holding real estate not necessary in the operation of their business", is a valid and subsisting statute of the State of North Dakota, notwithstanding the contentions of the appellant that such statute is repugnant to the Fourteenth Amendment to the Constitution of the United States, and that the application of such statute to appellant and to its property deny it the equal protection of the law, deprive it of its property without due process of law contrary to the Fourteenth Amendment, and is violative of rights guaranteed to appellant by Section 10 of Article I of the Constitution of the United States.

The challenged legislation is found in the Laws of North Dakota of 1933, pp. 494, 495; it was amended by Chapter 89, Laws of North Dakota of 1933 and by Chapter 111, Laws of North Dakota 1935; as a result of recodification of statutes, the legislation is now found in Chapter 10-06 North Dakota Revised Code of 1943.

The Initiative Measure so challenged, reflecting the material changes accomplished by the amendments, reads as follows:

Section 1. "That all corporations, both domestic and foreign, except as otherwise provided in this Act, are hereby prohibited from engaging in the business of farming or agriculture." Section 1, Chap. 89, Laws 1933,

Section 2. "That all corporations, both domestic and foreign, who now own or hold rural real estate, used or usable, for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall dispose of the same within ten years from the date that this Act takes effect, provided that during said ten year period said corporations may farm and use said real estate for agricultural purposes provided further that the ten year limitation provided by this Section shall be deemed a covenant, running with the title to the land against any grantee, successor of (or) assignee of such corporation, which is also a corporation". Section 2, Chap. 89, Laws 1933.

Section 3. "That any corporation, either domestic or foreign, that acquires any rural real estate, used or usable, for farming or agriculture, by judicial process or operation of law, hereafter, except such as is reasonably necessary in the conduct of its business, shall dispose of such real estate within ten years from the date that it is so acquired, provided that during said ten year period it may farm and use the same for agricultural purposes, provided further that the ten year limitation provided by this Section shall be deemed a covenant, running with the title to the

land against any grantee, successor of (or) assignee of such corporation, which is also a corporation." Section 3, Chap. 89, Laws 1933.

Section 4. "That the title and ownership of any real estate acquired, in any manner, by any domestic or foreign corporation, since the approval and adoption of the aforesaid initiated law, is hereby declared to be legal and valid for all purposes, notwithstanding any provisions in said initiated law contained, but subject however, to all of the provisions now contained in said initiated law as hereby amended and reenacted." Section 4, Chap. 89, Laws 1933.

Section 5. "That nothing in this Act shall be construed to prohibit co-operative corporations, seventy-five per cent of whose members or stockholders are actual farmers, residing in (on) farms or depending principally on farming for their livelihood, from acquiring real estate and engaging in co-operative farming or agriculture."

Section 6. "That in case any corporation, either domestic or foreign, violates any provisions of this Act and fails within the time fixed by this Act to dispose of any real estate after it has acquired title to same, which is not reasonably necessary for the conduct of its business, then title to such real estate shall escheat to the county in which such real estate is situated upon an action instituted by the State's Attorney of such county; and such county shall within one year dispose of same at public auction to the highest bidder, and the proceeds of such sale, after all expenses of such procedure shall have been paid, shall be paid to the corporation that formerly owned the same."

(R. 32, 33, 34)

This action, commenced in December 1941, was brought to obtain an injunction against the enforcement of the law against appellant's property acquired by it before the legislation was passed, and also to secure a declaratory judgment under the provisions of the Uniform Declaratory Judgments Act of North Dakota (Chap. 237, Laws 1923, Supp. 1925, Sections 7712a1-a16), that such real property owned by appellant was not subject to the initiative measure (R. 1).

The District Court of Cass County, finding that the subject matter of the action was a proper one for a declaratory judgment, sustained a demurrer to the complaint (R. 15). On appeal the Supreme Court of North Dakota affirmed that holding (R. 29). Under North Dakota law, an order overruling or sustaining a demurrer is classified as an intermediate order (Section 7832 North Dakota Compiled Laws 1913); Devereaux v. Katz, 22 N.D. 351, 133 N.W. 553; Langer v. The Courier News, 48 N.D. 280, 183 N.W. 1009; Asbury Hospital v. Cass County, North Dakota, ___ N.D. ___, 16 N.W. (2d) 523. The Supreme Court of North Dakota, upon such appeal, did affirmatively find that the subject matter of the action was a proper one for the rendition of a declaratory judgment, and did declare the law but adversely to appellant's contentions (R. 29).

Upon remand to the District Court further proceedings were had, and the District Court made its findings of fact, conclusions of law, order for judgment and final judgment adversely to appellant (R. 16-20). An

appeal from this final judgment of the District Court of Cass County was taken to the Supreme Court of North Dakota, and it, on such appeal, rendered its decision and final judgment of affirmance (R. 21) (R. 59-63). An appeal to this Court was thereafter duly allowed (R. 63-64). The Supreme Court of the United States has jurisdiction to review a declaratory judgment such as is here involved. Nashville, Chattanooga, & St. Louis Ry. v. Wallace (1933) 288 U.S. 249. Under the circumstances, it is contended that this Court has jurisdiction.

STATEMENT OF THE CASE

Appellant brought this suit in the District Court of Cass County, North Dakota, in December 1941, under the Uniform Declaratory Judgments Act of North Dakota (Chap. 237, Laws 1923, Supp. 1925, Section 7712a1-16), to secure a judicial declaration that certain property owned by the appellant is not subject to the provisions of an initiated measure adopted June 29th, 1932, by the State of North Dakota entitled "An Act prohibiting corporation farming, and relating to corporations acquiring and holding real estate not necessary in the operation of their business." (R. 1-15). This Act is printed in full on pp. 3 and 4 of this brief.

Appellant alleged, and the Court below found to be true (R. 16), the following facts:

Appellant, Asbury Hospital, is a nonprofit corporation, with perpetual existence, organized under the laws of the State of Minnesota; it is a corporation of, and subject to the discipline of the Methodist Episcopal

Church, and is created and exists for religious and charitable purposes solely; under the laws of the State of Minnesota it has power to sue in any court, to acquire or purchase, or otherwise hold, enjoy, improve, lease, encumber and convey real and personal property (R. 1-2).

Prior to 1925 appellant became the owner of a real estate mortgage on 160 acres of land in Cass County, North Dakota; this mortgage and others came to it through the Will of Maria H. Williams; on November 27th, 1925, prior to the passage of said Initiative Measure, it became the owner of the real property covered by such mortgage, the same having been conveyed to it in liquidation and satisfaction of the indebtedness secured by the mortgage; appellant is still the owner in fee simple of such property (R. 2-3); the real property is farming land used and usable for farming; appellant is not engaged in the business of farming and agriculture, and since the date of the acquisition of such property, the same has been farmed by residents of North Dakota under various farm lease contracts on the usual forms which prevail in the community where the land is situated (R-3). When appellant acquired said mortgage, and when it acquired title and ownership of said real estate, appellant had the right, power and authority under its Articles of Incorporation and under the laws of the State of Minnesota, to be and become the owner of such mortgage and of such real property; and at the time and on the date that appellant became the owner of said mortgage and of said real estate, there existed in North Dakota no law or statute restricting or forbidding the plaintiff's ownership of said mortgage

or of said real estate, and that when said real estate was acquired by appellant, it had the right under the laws of North Dakota as they then existed, to be and become the full, unrestricted and unconditional owner of said mortgage and of said real estate; and to acquire a full, complete and indefeasible title in and to said property (R. 3).

While the record is silent on the question as to whether or not Asbury Hospital, as a Minnesota corporation, ever qualified as a foreign corporation in North Dakota under its statutes, it is a fact that Asbury Hospital did not qualify as a foreign corporation in that State. However, Asbury Hospital was not obligated by North Dakota statutes to qualify as a foreign corporation.

Section 5238, Supp. 1925 North Dakota, regulating the doing of business in North Dakota by foreign corporations, while providing that no foreign corporation shall transact any business within this state, or acquire, hold or dispose of property, real or personal, until certain conditions are complied with, does further provide:

> "The provisions of this Chapter shall not apply to corporations created for religious or charitable purposes solely, nor to the holding and disposing of such real estate as may be acquired only by foreclosure or otherwise in liquidation of mortgages or other securities by corporations which may not have complied with the provisions of this article."

This legislation was amended by Chapter 116, Laws of North Dakota 1937, known as the Foreign Corporation Act, prescribing conditions for obtaining certificates of authority by foreign corporations. That act provides,

however, that "corporation" shall mean a corporation formed for profit. Asbury Hospital was a religious, charitable, and nonprofit corporation (R. 1-2) and was therefore not either eligible nor required to qualify as a foreign corporation in North Dakota.

The defendants, appellees here, in this action, are Cass County, North Dakota; R. F. Croal, as States Attorney of said County, and Alvin C. Strutz, as Attorney General of the State of North Dakota, and their successors in office; the defendants threatened to enforce said legislation against the appellant's property, and unless restrained and enjoined from so doing, would commence action, to the end that the title to said property would escheat to the county immediately following July 29th, 1942, in accordance with the provisions of said initiative measure (R. 4).

Appellant, since 1930, constantly attempted to sell the real property in question but has been unable to sell the same for the amount of the mortgage originally on it, and any sale which appellant might make would be substantially below the amount of money plaintiff has invested therein, and any sale of the property that might be made by the county, pursuant to proceedings for an escheat under such initiative measure, would be for less than the amount of the mortgage, costs and expenses of said action, and a sale under the provisions of such law would result in further decreasing any amount that might be received upon the sale (R. 13).

Such real estate is not necessary for the conduct of appellant's business excepting in the following respects: Appellant is permitted by the laws of Minnesota to

make investment of funds not immediately required for its operations and the ownership of said mortgage, and the subsequent acquisition of title to the lands covered thereby represents a legal and lawful function and exercise of one of the powers of plaintiff as a corporation; the holding of such surplus funds in such investments is one of appellant's lawful functions and powers, and as such constitutes a part of the conduct of its business (R. 13).

Appellant contended in the court below that the application and enforcement of said initiated law as against the appellant and its real property acquired prior to the passage thereof, would be violative of rights guaranteed to appellant by Section 10, Article I of the Constitution of the United States prohibiting states from impairing the obligation of contract, and by Section 1, Article 14 of the Amendments thereto, in that the enforcement of such law against appellant's property acquired prior to the passage of said law, confiscated its property, impaired vested rights, took its property without due process of law, and denied appellant the equal protection of the law under the Fourteenth Amendment. (R. 11-12). An actual controversy existed between appellant and appellees as to the application of such legislative enactments (R. 36) (R. 38).

The record also shows that appellant owned approximately thirty other parcels of land in North Dakota (R. 5-6); that other religious and charitable organizations of various types also possessed land holdings of similar character (R. 6-11).

Judgment was asked of the court below that such initiative measure be adjudged and declared to be not applicable to farm lands acquired prior to July 29th, 1932, the effective date of such legislation; that if such legislation be held to be applicable, that it be declared unconstitutional and unenforcible, and that an appropriate judgment be entered to prevent defendants from instituting any action or proceeding under the terms thereof (R. 14-15).

Defendants entered a general demurrer to the complaint (R. 15). The District Court of Cass County, while holding that the action was one in which a declaratory judgment should be entered, nevertheless sustained the demurrer (R. 15-16). An appeal was taken to the Supreme Court of North Dakota, and that Court in Asbury Hospital vs. Cass County, et al, 72 N.D. 359, 7 N.W. (2d) 438 (R. 29) held that the action was properly brought for a declaratory judgment (R. 38) but declared the law contrary to appellant's contentions (R. 29-58). The case was remanded to the District Court for further proceedings (R. 58).

As heretofore pointed out, an order sustaining a demurrer is an intermediate order and not a final judgment. Asbury Hospital v. Cass County et al: ___ N.D. ___, 16 N.W. (2d) 513. On remand to the District Court further proceedings were had and the District Court made its findings of fact, conclusions of law, order for judgment and final judgment declaring the law adversely to appellant's contentions, and denying the injunction (R. 16-20). An appeal from this final judgment to the Supreme Court of North Dakota was

then taken, and on November 3rd, 1944, it rendered its final judgment of affirmance. (R. 21). The opinion upon this appeal is set forth in the Record (R. 59-63).

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

I.

The Supreme Court of North Dakota erred in its decision and judgment in holding that the Initiative Measure entitled "An Act Prohibiting Corporation Farming and Relating to Corporations Acquiring and Holding Real Estate Not Necessary in the Operation of Their Business", (North Dakota Session Laws for 1933 at pp. 494 and 495, and as amended by Chapter 89 of the North Dakota Session Laws for 1933, and as further amended by Chapter 111 of the North Dakota Session Laws for 1935) is not repugnant to and does not operate to infringe upon or deny to the appellant the rights guaranteed to it by Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Affirmatively stated: The enforcement of such statute against appellant's property acquired by it prior to the passage of the statute, is an unwarranted infringement of vested property rights; and because other corporations are permitted to hold real property free from the restrictions imposed by such statute, it discriminates against and denies appellant the equal protection of the laws.

II.

The Supreme Court of North Dakota erred in said final decision and judgment by holding that such Initiative Measure does not impair the obligation of contract

between such state and the appellant, within the meaning of Article I Section 10 of the Constitution of the United States.

Affirmatively stated: Where the state of North Dakota, without regulation or restriction, allowed and permitted appellant to acquire the property in question, and where its rights therein were fully vested, an implied contract arises which may not thereafter be divested and impaired by legislation infringing rights incident to ownership of real property.

SUMMARY OF THE ARGUMENT

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Buchanan vs Warley, 245 U.S. 60
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Coombes vs Getz, 285 U.S. 434
Sears vs Akron, 246 U.S. 242
Fair Haven & Westville Road Co. vs. New Haven, 203 U.S. 379
Missouri Pac. Ry. Co. vs Nebraska, 164 U.S. 403
Adirondack Ry. Co. vs New York, 176 U.S. 335
Lake Shore & M.S. Ry. Co. vs Smith, 173 U.S. 684

Greenwood vs Union Freight Co., 105 U.S. 13
Union Pacific Ry. Co. vs U.S., 99 U.S. 700
The Boston Beer Co. vs Massachusetts, 97 U.S. 25
State vs Neff, 52 Ohio St. 375
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2. The legislation deprives appellant of the use of its property during the period from the time of escheat to the date of public sale by the county 27

3. The ten-year period provided in the Act for the disposal of land was, under the conditions as they existed, so inadequate as to amount to confiscation 29

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(c) Cooperative corporations may hold land indefinitely 46

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Davidow vs Wadsworth Mfg. Co., 211 Mich. 90

Gulf, Colo. & Santa Fe Ry. Co. vs Ellis, 165 U.S. 150

Power Mfg. Co. vs Saunders, 274 U.S. 490

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St. Louis & S.F. Ry. Co. vs Cross (C.C. Okla.) 171 Fed. 480

Western Union Tel. Co. vs Kansas, 216 U.S. 1

ARGUMENT

I.

AS APPLIED TO APPELLANT'S PROPERTY ACQUIRED BEFORE THE PASSAGE OF THE CORPORATION FARM LAND ACT, THE LEGISLATION IS IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT.

No issue exists as to the right of appellant to engage in the business of farming. The record shows that it is not so engaged.

No contention is made that the state of North Dakota does not possess the general power to regulate the acts of both domestic and foreign corporations; but we deny the power of the state in exercising that power of regulation and control, to impair or infringe vested rights in property.

No contention is made that the state may not limit the tenure of holding of real property by corporations; but we deny that such unlimited right exists as to properties acquired before such control is made effective by legislation.

The property of corporations may be taken or its use controlled in only three ways:

(a) By exercise of the power of eminent domain; (b) by a valid exercise of the police power; and (c) under the reserved control which the state has over corporations generally.

In the instant case there is and can be no claim that under this legislation there is any taking of property for a public use, or any taking under the power of eminent

domain; neither is there any question of police power involved, because the several decisions of the North Dakota Supreme Court make it plain that the validity of the law in the instant case is not based upon the exercise of the state's police power. The sole and only ground upon which the North Dakota Supreme Court based its conclusions is upon the assertion that since the state possesses a regulatory control over the affairs of corporations, both domestic and foreign, that in the exercise of such regulatory control it may lawfully enact such a statute as this, and make it constitutionally applicable to all holdings of real estate, whether acquired before the act was passed or afterwards.

We may concede for the purpose of this part of the argument, that as to all lands acquired after July 29th, 1932, the prohibition against holding the same for more than ten years, is valid. The vital question is as to whether or not the prohibition against such holding beyond the ten year period can be constitutionally applied to lands acquired before the act was ever passed, and in the manner prescribed by the Act.

The material parts of this legislation which are pertinent to this action, provide in substance as follows:

(a) Corporations are required to sell farm lands acquired before 1932, within ten years after the date the act became effective;

(b) Corporations are permitted to farm the lands in the meantime;

(c) If the lands be not disposed of, the county is required to bring an action for the escheat of the title,

and the court must enter a judgment of escheat transferring the title to the lands in question to the county;

(d) The county shall sell the land within one year at public auction, and the proceeds of the sale, less the expenses, shall be paid over to the corporate owner;

(e) A corporation may retain lands which are necessary to the conduct of its business, and the act is not applicable to cooperative corporations if 75% of the members are farmers, or principally dependent upon farming for their livelihood.

When appellant acquired the lands involved in this case, no such regulations or restrictions existed. It acquired a fee simple title through liquidation of the mortgage which it owned thereon. It was within the state, with the permission of the state; it made its investment at a time when the law permitted it, if it acquired title, to obtain, have, and hold a full, complete and unconditional title.

1. The legislation compelling appellant to dispose of its land against its will upon penalty of escheat and a sale thereof by the county at public auction, infringes vested property rights.

The legislation in question prohibits appellant from continuing the ownership of the land, no matter when acquired. When Asbury Hospital became the owner of this land in 1927, it, under the well settled principles of the common law, acquired more than a bare legal title. The right of property is a broad, comprehensive right which goes far beyond the mere possession of legal title.

As stated by Mr. Justice Day, in Buchanan v. Warley, 245 U.S. 60;

> "The 14th Amendment protects life, liberty, and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U.S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. Cooley's Bl. Com. 127."

Another statement of the rule is that of the Court in Spann v. Dallas, 111 Tex. 350, 235 S.W. 513:

> "Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right. Therefore a law which forbids the use of a certain kind of property, strips it of an essential attribute and in actual result prescribes its ownership."

Neither should it matter that the whole property is not taken from the corporation by the terms of the Act. Confiscation, within the meaning of the Constitution, does not necessarily mean the taking of all the property. The taking of some property rights, or the serious injury thereto, is still confiscation.

The property right, of which Asbury Hospital is deprived by this legislation, is the right to determine when, to whom, upon what terms, and for what price it is willing to sell its property.

The right of security in the ownership of property is one of the fundamental precepts of our democratic civilization, long antedating the Federal and State constitutions. As Mr. Justice Pitney has said, in Ochoa v. Hernandez Y. Morales, 230 U.S. 139, 161:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

While, to some extent, the Supreme Court of North Dakota recognized these principles, that Court avoids the effect of these principles by reasoning as follows:

(a) It asserts that a foreign corporation is within the State as a matter of privilege, and a domestic corporation is constantly subject to regulation by the acts of the legislature.

(b) Because this is a perpetual reserved right, any property rights acquired by any corporation are taken

subject to the contingency that any right or privilege may be withdrawn, or its powers of regulation may be extended.

(c) The court then concludes that title to real estate acquired by corporations is a defeasible title, which might be divested, regulated, or controlled, and since title was taken subject to this contingency, the corporation has no constitutional complaint.

We contend that this logic and reasoning is contrary to the decisions of the Supreme Court of the United States. The same contention was made in the cases of Western Union Telegraph Company v. Kansas, 216 U.S. 1. In that case Mr. Justice White said:

> "It is shown that the telegraph company, many years ago, went into the state of Kansas, constructed its lines, established its offices, etc., and has since been engaged in business, both interstate and local. It is not disputed that there was no law in the state forbidding the company from doing as it did. From this it results that the corporation went into the state, constructed its plant, and carried on its business, on the implied invitation, or, at least, with the tacit consent, of the state. . . .The reasoning by which it is thus sought to sustain the right of the state to exert a power prohibited by the Constitution of the United States, and to outlaw the corporation by depriving it of the protection afforded by that instrument, is this: The state, it is insisted, has the right to prevent a foreign corporation from coming into its jurisdiction and engaging there in local business, and this power, in the nature of things, must include the right to affix such con-

ditions to the privilege of coming in as the state chooses to impose. Under these circumstances, the argument proceeds, it becomes immaterial to consider the character of the condition annexed by the state to the enjoyment of the right to come in, since, although such conditions be repugnant to the Constitution of the United States, and destructive of the most obvious and sacred rights, as the condition only becomes operative provided the corporation elects to come in, therefore the condition is not obligatory, but is voluntarily assented to by the corporation, and hence may not be by it questioned. But even if, for the sake of the argument only, the general correctness of the proposition be conceded, it has no application to the case here presented. Such is the case, since this cause is concerned not with the power of the state to prevent a corporation from coming in for the purpose of doing local business, and to attach conditions to the privilege of so coming in, but involves the right of the state to confiscate the property of the corporation already within the state, and which has been there for years, devoted to the doing of local business, as the result of the implied invitation or tacit consent of the state, arising from its failure to forbid or to regulate the coming in. In other words, this case involves determining, not how far a state may arbitrarily exclude, but to what extent, after allowing a corporation to come in and acquire property, a state may take its property within the state without compensation, upon the theory that the corporation is not in the state, and has no property right therein which is not subject to confiscation. . . . . .

Nor, I submit, is there force in the suggestion that, under the facts here disclosed, the company cannot be heard to complain, because, as it was in the state without express authority, it must be assumed to have gone into the state and made its investment subject to the exertion by the state of its authority. I concede the proposition to be sound in so far as it includes the right of the state to exert its lawful powers. That is to say, I concede that the corporation, in going in and investing its property within the state, did so subject to the rights of the state to exert, as to the property thus in the state, all lawful powers which might be called into play as to property so situated, of the character of that under consideration. But I cannot assent to the correctness of the contention in so far as it asserts that the state may suffer a corporation to come into its borders, invest in property therein, and then, after having allowed, by acquescence or implied invitation, such a situation to arise, the state may treat the corporation as if it had never come in and its property within the state as if it were wholly out of the state, and despoil the corporation of its rights and property upon such false assumption."

And in the case of Chicago, Milwaukee, & St. Paul Railroad Company v. Wisconsin, 238 U.S. 491, Judge Lamar said:

"In the brief of counsel for the state it is argued that the statute can be sustained as a valid exercise of the state's reserved power to altar the charter of the company. That question does not seem to have been raised in the state court, nor was its decision based on that proposition. Indeed, such a ruling would seem to have been opposed

to State ex rel. Northern P.R. Co. v. Railroad Commission, 140 Wis. 157, 121 N.W. 919, and the Water Power Cases, 148 Wis. 124, 38 LRA (NS) 526, 134 N.W. 330, where it was held that the right to amend a charter does not authorize the taking of the company's property without just compensation. The same view has been repeatedly expressed in the decisions of this court. For example, in Shields v. Ohio, 95 U.S. 324, 24 L. Ed. 359, it was said that 'the power of alteration and amendment is not without limit. The alterations must be reasonable. . . .and be consistent with the scope and object of the act of incorporation.' . . .Again, in Stearns v. Minnesota, 179 U.S. 223, 259, 45 L.Ed. 162, 180, 21 Sup. Ct. Rep. 73, it was held that the reserved right to amend a corporate charter 'does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by . . . taking of property without due process of law.' Lake Shore & M.S.R. Co. v. Smith, 173 U.S. 690, 43 L. Ed. 861, 19 Sup. Ct. Rep. 565; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U.S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; Sinking Fund Cases, 99 U.S. 720, 25 L. Ed. 501; Miller v. New York, 15 Wall. 498, 21 L. Ed. 104; see also Delaware, L. & W.R. Co. v. Public Utilities, 85 N.J. 28, 38, 88 Atl. 849, where it was held that, under such a power, the company could not be required to furnish free transportation to certain designated officials. This conclusion makes it unnecessary to discuss the assignments relating to interstate commerce."

This court in a long line of decisions has settled the principle, that while the authority of a state under the

socalled reserved power over corporations is wide, it is not unlimited, and neither vested property rights nor the obligation of contracts may be destroyed or impaired.

The following decisions, we submit, support this proposition:

Phillips v. Jenkins, 297 U.S. 629
Coombes v. Getz, 285 U.S. 434
Sears v. Akron, 246 U.S. 242
Fair Haven & Westville Rd. Co. v. New Haven, 203 U.S. 379
Missouri Pacific R. Co. v. Nebraska, 164 U.S. 403
Adirondack Railway Co. v. New York, 176 U.S. 335
Lake Shore Ry. Co. v. Smith, 173 U.S. 684
Greenwood v. Union Freight R.R. Co., 105 U.S. 13
Union Pacific R.R. Co. v. United States, 99 U.S. 700
The Boston Beer Co. v. Massachusetts, 97 U.S. 25

As stated by the Court in the case of State v. Neff, 52 Ohio St. 375, 40 N.E. 720:

"Whatever difficulties have been encountered by the courts in ascertaining the limits of this reserved legislative power, they concur in denying that under it the legislature can strip a corporation of its rights of property. 'The power of alteration and amendment is not without limit. The alterations must be reasonable. They must be in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases.' Shields v. Ohio, 95 U.S. 324.

In the case of Gilman v. Tucker, 128 N. Y. 190, 28 N.E. 1040, the Court said:

> "It cannot be the subject of doubt that an act of the legislature which provides for an involuntary transfer of property from one person to another without due process of law, whether with or without compensation, violates the principles of the fundamental law, whatever may be the pretext upon which it is founded. It was said by Justice Jewett, in Embury v. Conner, 3 N.Y. 511, after a review of the authorities: 'I think these decisions should be regarded as having settled the point that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, although compensation be made'."

The constitutional protection of vested rights extends to foreign corporations which have been permitted to acquire property within the State.

In the case of Mulford Co. v. Curry, 163 Calif. 276, 125 Pac. 236, that Court said:

> "The limitations upon the power of the state to forbid a corporation from doing a domestic business within its borders, or to regulate the conduct of that business, may be thus summarized: 'A corporation, unless expressly forbidden so to do, may acquire rights of contract and property in a foreign jurisdiction. A State, however, may exclude absolutely a foreign corporation not engaged in interstate commerce, but which proposed solely to engage in domestic business, from doing such business within its limits, and so may, of course, impose terms and conditions upon which alone such business may be commenced within its

limits, provided no unconstitutional condition is made a part of any actual agreement. S.P. Co. v. Denton, 146 U.S. 202, 13 Sup. Ct. 44, 36 L.Ed. 942. When a foreign corporation has once engaged in domestic business within the state, the state may not exercise its powers of exclusion or regulation to the destruction of the property of the corporation or of its vested constitutional rights."

To the extent that this legislation compels appellant to sell its property, and deprives it of the right to determine when, and for what price, and to whom it may desire to sell, this legislation infringes its property rights. This, we submit, cannot be done under the socalled reserved power of the state over corporations. It is under this socalled reserved power that the North Dakota Supreme Court based its decision, and upon that alone. In this, we submit, it erred.

2. The legislation deprives appellant of the use of its property during the period from the time of escheat to the date of public sale by the county.

It is to be observed from Section 6 of the Act, (page 4 hereof), that after a judgment of escheat is entered in an action brought for that purpose, the county is given one year to sell the land at public auction to the highest bidder. It is clear that after a judgment of escheat is entered, the corporate title is divested and title is vested in the county. The rights of the corporation in the land are at an end. The county is not obligated to make an immediate sale, nor are there any provisions in the Act for the disposition of growing crops. During that one year period a crop may be planted and harvested.

There are no provisions in the Act as to what disposition should be made of the rents and profits. The argument may be made that the corporation has no complaint if it receives the value of the escheated property. We point out that the receipt by the corporation of the value of the escheated property as determined at a public sale, still does not compensate the corporation because under the law, it has been deprived of the value of the use and occupation of the land during the one year period, or such time as may run before a public sale is had. The argument that a corporation cannot complain if it receives the value of the land as determined by public sale, is, we submit, without merit. A public sale provided for by the statute does not necessarily mean that the corporation will receive the true value of the property. The law prescribes that it shall be sold to the highest bidder. That bid may or may not be consistent with value. Furthermore, we point out that the public auction prescribed by the law to be held by the county, is one which is unregulated and uncontrolled; there is no provision for appraisal, or for judicial review, or any right to vacate the sale in case of an inadequate bid. Certainly it is obvious that when the court has entered its judgment of escheat, its power and jurisdiction are at an end, and there is nothing in the Act which would give the court the right to control the sale or to vacate it for the protection of the former corporate owner.

The North Dakota Supreme Court suggests that upon the authority of Greenwood v. Union Freight R.R. Co. 105 U.S. 13, the court has some power with

respect to the disposition of the property. But in the Greenwood Case the court was referring to a situation where the legislature made no law or direction with respect to the disposition of the property of a corporation where its charter was repealed. In the instant case the legislation did provide a specific mandatory direction; it provided upon escheat that title should pass to the county, and the county should sell the property at public auction. The Act did not prescribe that the court should sell it, or supervise or control its sale.

We submit that where the law takes away title, possession, and use of the property, and substitutes for it such money as some third party may be able to obtain for it upon a public uncontrolled and unregulated sale, this does not amount to compensation to the owner, and that it does amount to a taking of property contrary to the Fourteenth Amendment. Judicial sales generally provide for appraisal, supervision, and confirmation by a court, with the clear power on the part of the court to vacate sales where the price bid is inadequate. Certainly this Act does not provide for a judicial sale, and the corporate owner is subject to whatever circumstances may exist, and powerless to protect its interest in the land.

3. The ten year period provided in the Act for the disposal of land was, under the conditions as they existed, so inadequate as to amount to confiscation.

In the case of Abie State Bank v. Bryan, 282 U.S. 765, this court established the principle that a regulation, although valid when made, may become by reason of later events arbitrary and confiscatory in operation. In

the instant case the statute adopted in 1932 gave corporations a ten year period to dispose of their lands, but as will be demonstrated, the economic situation during that ten year period was such that corporations were unable to do so.

That courts will take judicial notice of economic data is now an established principle of constitutional law. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555. This statute allowing a ten year period may superficially appear to be reasonable. But "in passing on constitutional questions the Court has regard to substance and not to mere matters of form, and * * * in accordance with familiar principles the statute must be tested by its operation and effect".[1]

In the words of Mr. Justice Harlan:

> "The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority".[2]

It is a demonstrable fact that during the period from July 1932, corporations have not been able to dispose of their lands. It has been economically impossible for them to do so.

North Dakota farmers have not been prevented from acquiring land, even at ridiculously low figures during the last decade.

We learn from a report of the Works Progress Administration that there are potential county lands

[1]Hughes, C. J., in Near v. Minnesota, 283 U.S. 697, 708.
[2]Mugler v. Kansas, 123 U.S. 623, 661.

(with five or more years' taxes delinquent) in the amount of 7,333,678 acres.[3] That there are already county tax deeds for 2,106,103 acres and that the lands owned by the Bank of North Dakota and the Board of University and Schools bring the total amount of such lands up to 13,258,021 acres. This huge reservoir of good land could be acquired by the farmers of North Dakota at very low prices.

The statistics hereafter set out as to the hardships under which the farmers labored during this period show quite clearly that the corporate ownership of land had nothing to do with these hardships, but rather that the hardships forced the foreclosures which resulted in some corporate ownership of land.

There is no suggestion that the appellant is holding its land for high prices. In fact, just the opposite is true. If Asbury Hospital is allowed to dispose of its land in the normal way, these lands will find their way back into the hands of North Dakota farmers just as fast as they are able to purchase them. Any forced sale at confiscatory prices would only result in the lands being accumulated by a few individual speculators who had the cash to buy them.

It is of the utmost importance that this Court recognize at the outset that this statute is not directed against property used for immoral or anti-social purposes which could justify confiscation under the so-called "police power" of the state, nor does it purport to condemn property for public purposes under any principle of

[3] O.P. No. 665-73-3-65 entitled "Publicly Owned Lands and Related Factors —North Dakota", dated December 23, 1940.

eminent domain. The statute is not aimed against farm lands held for speculative purposes nor lands allowed to be infested with weeds or grasshoppers. The reason for confiscation is not the use to which lands are put, but the corporate ownership thereof.

Asbury Hospital, because it chose to carry on its charitable work as a corporation, does not waive the protection of the Federal constitution. Corporations are creatures of the law and are not evil per se. They have always been granted the same protection under the law as individuals. It is difficult to understand how anyone can suppose that Maria H. Williams could legally own the farms in question and devote the proceeds therefrom to care for the sick in Asbury Hospital, and yet it be illegal for Asbury Hospital to take those farms at her death and devote the proceeds therefrom to care of the same persons. They are the ones who will suffer in any event. Asbury Hospital as a corporation should enjoy the same protection for its property under the Federal constitution as does an individual.

There has been no market for these lands. There have been no purchasers. There will be no purchasers at any reasonable price if the lands are escheated and sold in accordance with the terms of the statute. For all practical purposes, this is confiscation.

We start out with the situation which prompted passage of the statute: a certain amount of real estate was acquired by religious, charitable, educational or business corporations by reason of foreclosure of mortgages given to secure borrowings by farmers. The statute directed these corporations to dispose of this

real estate within ten years. But in order to sell there must be a market. There was no market.

In 1927, the number of farms changing ownership through voluntary sales and trades was 28.3 farms per thousand for the United States as a whole, and 23.9 farms per thousand for the State of North Dakota.* In 1931, the United States figure had declined to 19 farms per thousand; in North Dakota it had declined to 17.9. In 15 States a lower figure prevailed. In 1932, the figure for North Dakota declined to 12.4 farms per thousand as against 16.2 for the United States as a whole. In only 5 states was the figure lower. In 1933, compared with a figure of 16.8 farms per thousand voluntarily sold or traded throughout the United States, the figure for North Dakota had declined to 10.7 with only 2 states having a lower figure. Thereafter in 1934 and 1935, possibly due to the passage of the law in question, the comparative ranking of North Dakota rose, only to drop again. In 1934, 7 states showed a lower percentage of voluntary sales and trades. In 1935, only 5 states were lower. In 1936 only 2 states (South Dakota and Utah) were lower, and in 1937, 1938 and 1939 North Dakota had the smallest percentage of farms voluntarily

*United States Department of Agriculture Circular No. 261 (Jan. 1933) "The Farm Real Estate Situation 1931-1932", p. 37. Figures are for the year ending March 15, 1927.

sold and traded of any state in the Union.[5] In 1940 conditions had improved and North Dakota ranked ahead of 6 other states.[6] But by this time the ten year period was approaching an end.

What was the underlying reason for this situation?

In view of the existence of the law under consideration, and the obvious desire of corporations under any set of circumstances to dispose of real estate involuntarily acquired, it is quite apparent that the paucity of voluntary sales and trades in North Dakota was entirely due to a lack of purchasers. Farmers, particularly active farmers, are the largest group of farm land buyers.

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[5]Data obtained from United States Department of Agriculture Circular No. 354 (April, 1935) "The Farm Real Estate Situation 1933-1934", page 30; United States Department of Agriculture Circular No. 548 (October, 1939) "The Farm Real Estate Situation 1936-1937, 1937-1938, and 1938-1939", page 32.

Year	North Dakota	United States Average
1931	17.9	19.
1932	12.4	16.2
1933	10.7	16.8.
1934	13.7	17.8
1935	14.	19.4
1936	14.6	24.8
1937	13.8	31.5
1938	14	30.5 (as revised)
1939	14.4	29.6 (as revised)

Figures are for yearly periods ending March 15.

[6]Preliminary Report, United States Department of Agriculture, March, 1941. The figure is 20.9 for North Dakota; U.S. Average 29.8.

accounting for over three-fourths of the total.[1] This potential group of purchasers had simply ceased to exist in North Dakota during the period 1930 to 1940, due to economic conditions. No farmer had any money with which he could finance the purchase of a farm despite the fact that the value per acre of North Dakota farm land declined drastically during this ten year period. In 1933, a year after the law was passed, there were 12 states in which the value of farm lands had shrunk to a degree greater than the shrinkage in North Dakota. This same situation existed in 1934, but in 1935 and 1936 only 7 states were reported as having a greater depreciation. In 1937 North Dakota was sixth from the bottom, in 1938, fourth from the bottom, in 1939 only Missouri, South Dakota and Montana had lower comparative values than North Dakota, in

[1] According to United States Department of Agriculture Circular No. 548, "The Farm Real Estate Situation, 1936-1937, 1937-1938, and 1938-1939," page 37, over four-fifths of farms voluntarily bought are bought by local residents, over three-fifths of the buyers are active farmers, and about three-fourths of the buyers purchase for the purpose of operation. Although no specific figures are available for North Dakota it appears (page 38) that in the west north central group of states over four-fifths of the voluntary sales and trades of farm real estate during the period 1930 to 1940, inclusive, represented purchases by local residents. In 1939, 88% of voluntary purchases were made by local residents in this area, 71% being by active farmers. In this same bulletin, referring to the year 1937, it is said (Page 36): "Active farmers continue as the largest group of farm land buyers, accounting for somewhat over three-fifths of the total". According to the March, 1941, preliminary report of the United States Department of Agriculture "for the United States as a whole, active farmers continue as the most important group of buyers of farm land, accounting for approximately 68% of the total".

1940 only the state of South Dakota could rank as worse off than her sister state to the north.[8]

In 1930, the total value of farm land and buildings in the state of North Dakota was $951,000,000. In 1940 this had shrunk to $490,000,000.[9] Nor was there any influx of farmers into the state to take advantage of these depreciated values. The farm population of North Dakota declined from 397,294 in 1930 to 327,871

[8]Statistics for years prior to 1940 are taken from United States Department of Agriculture Circular No. 548, page 4, and for 1940 and 1941 from United States Department of Agriculture "Agricultural Finance Review, Vol. 4, No. 1, May, 1941", page 79. The 1941 figures are preliminary. The index numbers of estimated value per acre are based upon the 1912-1914 values which are arbitrarily given an index number of 100 as representing normal value. Comparative figures for North Dakota and the United States as a whole are as follows:

Year	North Dakota	United States
1913	100	100
1920	145	170
1930	95	115
1931	85	106
1932	75	89
1933	66	73
1934	68	76
1935	67	79
1936	68	82
1937	67	85
1938	64	85
1939	61	84
1940	57	85
1941 (prelim.)	56	86

[9]United States Department of Agriculture, "Agricultural Statistics, 1941", page 534. In 1920 the value was $1,489,000,000. During the period 1930-1940, although the number of farms in North Dakota had decreased from 77, 975 to 73,962, the total amount of land in farms had not appreciably decreased. In 1930 38,658,000 acres were under cultivation and in 1940 this had been reduced to 37,936,000 acres.

in 1940.[10] With an impoverished farm population and no immigration, but rather an exodus from the state, it is not difficult to understand why there was no market for farm lands. We refrain from quoting figures to demonstrate other facts well known to this Court militating against the possibility of an active market in North Dakota farmlands, namely, the existence of drouth conditions, of grasshoppers, of poor crops and of poor prices for farm products. Corporate farming was not responsible for these conditions, distressing as they were. But it was these conditions, among others, that prevented corporations from disposing of their farm lands.

In addition to the foregoing, a vast amount of acreage in the state has been forfeited for non-payment of taxes, thereby glutting the market with a superabundance of farms available for purchase at bankrupt prices. In 1932, 22 out of every 1000 farms in the state of North Dakota were forfeited by reason of delinquent taxes, as compared with an average of 13.4 for the United States as a whole. In 1933, the figure for North Dakota was 29.6 farms per thousand forfeited for this reason. After a short temporary decline during the period 1934 to 1938 during which the legislature of North Dakota strove by various statutory enactments to check the trend of forfeitures and afford the farmers an opportunity to retain their farms, the figure again rose in 1939 to 14.9 forfeited farms per thousand, and in 1940 to 16.3 farms per thousand. During the years 1939 and 1940 North

[10] United States Department of Agriculture, "Agricultural Statistics, 1941", page 548. The farm population in 1920 was 394,500.

Dakota had by far the highest percentage of farms forfeited for delinquent taxes of any state in the United States. The state next to North Dakota in this respect in 1939 was Montana, with 12.4 farms per thousand so forfeited; the third state in line was South Dakota, reporting 9.3 farms so forfeited. In 1940 North Dakota's figure was only approached by that of South Dakota (12.8 farms per thousand forfeited for taxes); the third state being Montana, with 10.6 of its farms so lost to the owner.[11]

The cash farm income of North Dakota was $150,160,000 in 1930. In 1932 it declined to $55,280,000 and it was not until 1936 that it again rose above the figure of $100,000,000. It did not again reach the 1930 level until 1940, when the reported income was $156,647,000.[12] Obviously there is no market for farms under these conditions.

Further statistics might be cited were it necessary to do so. It has been a decade of depression and great hardship for the farm population of North Dakota. We repeat, however, that these conditions were not caused by so-called corporation farming; in fact, it is probable that a goodly portion of the taxes paid to the state during this period were paid by the corporations which the Anti-Corporation Farming Law seeks to victimize. The Anti-Corporation Farming Law will not cure the farm depression, nor was it designed to do so. It demanded

[11]Data obtained from United States Department of Agriculture, Circulars Nos. 354, page 30, No. 548, page 32, and March 1941 Preliminary Report. The average throughout the United States in the years 1939 and 1940 was, respectively, 3.7 and 2.5 farms per thousand.

[12]United States Department of Agriculture Estimates.

that property be sold where no market existed, with a penalty of escheat in the event the impossible was not accomplished. As such, it is a confiscatory measure and should be condemned unhesitatingly as in violation of the Constitution of the United States.

The distressed condition of agriculture and the depressed prices of products and land were recognized during the period in question by both the State and National Government. Among other things, the Federal Government provided the following things for the relief of distressed farmers during the ten year period:

(a) Enlargement of the activities of the Federal Land Bank to provide funds for the saving of homes and reacquisition of foreclosed property;

(b) Creation of the Farm Administration;

(c) The creation of the Regional Agricultural Credit Corporations;

(d) The AAA program providing subsidies for farmers, including conservation and parity payments, and loans on grain for more than the market price;

(e) Federal Crop Insurance Program insuring against crop failures due to any cause;

(f) Passage and renewal from time to time of the Frazier-Lemke Bankruptcy Act.

The State of North Dakota, recognizing the period of emergency during this period, passed a general state moratorium law. (Chap. 242, Laws 1935). It was continued in force until July 1, 1943. (Ch. 190, Laws 1941).

The Supreme Court of North Dakota recognized in the case of Hunt v. Holmes, 64 N.D. 389, 252 N.W. 376, that a depression existed; it said:

> "It is a matter of common knowledge that because of the worldwide depression the property would be worth a great deal more on November 6, 1930, than it was in May 1932."

It was in June 1932 that this legislation was passed.

The State Legislature, in Chap. 157, Laws 1933, stated:

> "A public emergency and crisis exists. . . . . in that agricultural crops and products have been sold below the cost of production. . . ."

The State Legislature, in Chap. 161, Laws 1937, stated:

> "In view of the severe financial and economic distress prevailing throughout the State and Nation, and the extreme drought of the past two or three years, the legislature of the State of North Dakota hereby declares that a public economic emergency exists in the State of North Dakota."

The State Legislature, in Chap. 242, Laws 1935, expressly recognized "the distress of the farmers, the laborers, the businessmen, the tenants and the property owners, due to the extremely low prices of the products of the farm." Thus it appears that corporations were commanded to sell their lands at and during a time when no market existed therefore. This, we submit, is confiscation.

4. The discriminatory features of the legislation deny appellant the equal protection of the law within the meaning of the Fourteenth Amendment.

(a) Corporations which acquire land by purchase after July 1932, are not affected by the law at all, and may continue to hold such land without limitation or restriction indefinitely. This is obvious from a reading of the Act.

Section 2 of the Act (page 3 hereof) requires corporations which owned land when the Act was passed to sell within ten years. Section 3 of the Act requires corporations which acquired land by judicial process or operation of law to sell within ten years. It is only those corporations which acquired land after 1932 by judicial process or operation of law which must sell within the ten year period. Obviously, a corporation which purchased land by deed or grant after 1932 may hold it without limitation or restriction. This Act therefore, imposes the limitation of ten year ownership only upon corporations who happened to own land acquired before 1932, and upon corporations who acquired land thereafter "by judicial process or by operation of law". Corporations of all other classes are free to acquire land, and free to hold it without regard to the provisions of the Act in question.

Asbury Hospital is affected by the law because its land was acquired before 1932. If it acquired any land by mortgage foreclosure after 1932, such lands would also be affected. However, other corporations who desire to deal in lands and to buy, acquire, and hold the same after 1932, could do so with impunity and

without restraint. The Act therefore imposes its prohibitions against corporations whose title was acquired prior to a certain date, and against corporations whose manner of acquisition was "by judicial process or by operation of law." This, we contend, is not classification but is discrimination.

(b) Corporations especially organized to deal in farm lands may hold such lands indefinitely.

It was asserted by Asbury Hospital in the court below, that its land representing investment of surplus and endowment funds, was reasonably necessary for the conduct of the business of the corporation because the business of investment of its surplus funds was a power and function of the corporation itself. This contention was rejected by the Supreme Court of North Dakota. However, independently of that particular contention, it is clear that under this exception, corporations primarily formed for the purpose of acquiring, holding and dealing in land, may freely do so without limitation or restraint because such corporations fall squarely within the exception written into the statute. This makes it clear that corporate ownership as such is not one of the objects which prompted the enactment of this law.

Under similar statutes it has been uniformly held that corporations formed especially for the purpose of buying, selling, holding and dealing in lands fall within the exception of the Act.

> Sylvester Watts Smyth Realty Co. v. American Surety Co. of N.Y. 292 Mo. 423, 238 S.W. 494; Cree v. Associates Co., 192 Ky 669, 234 S.W. 288.

Ronaldson & Puckett Co. Ltd. v. Bynum, 122 La. 687, 48 So. 152;

A corporation may therefore, in North Dakota, buy, sell, deal in land and hold land for unlimited periods if it is organized especially for that purpose.

This view has been sustained by the lower courts of North Dakota.

In the case of Baldwin Corporation v. Dickey County, North Dakota, (District Court Dickey County), Judge Wm. H. Hutchinson rendered a written opinion. Omitting the preliminary statement, the pertinent facts and holding of the court are as follows:

> "The parties to this action upon oral argument were agreed that the controversy in this case was one properly determinable under the Declaratory Judgments Act. This question seems to have been settled by our own Supreme Court in the case of Asbury Hospital Corp. v. Cass County, et al., which case has been very recently decided.
>
> Do the provisions of the so-called Anti-Corporation Farming Act adopted in June, 1932, and amended in 1933 and in 1935 apply and thus involve the farm lands owned by the plaintiff, appears to be the question for the Court's decision. It will not be necessary for the Court in this memorandum to set forth the provisions in full of the so-called Anti-Corporation Farming Act. The Act does provide 'that all corporations, both domestic and foreign, who now own or hold rural real estate, used or usable for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall dispose of the same within ten years . . .'' For the decision

in this case, the facts properly pleaded must be considered as true. Those facts are that the plaintiff is a foreign corporation authorized to do business in the State of North Dakota. The corporation was organized for the purpose of engaging in the real-estate business, which would include the buying and selling of farm lands and the farming of lands owned by the plaintiff. The plaintiff has been engaged in the real estate business in North Dakota since November, 1917, and it now owns about eighty quarter-sections of farm land in Dickey County which is usable for farming purposes, and all was acquired before June, 1932. The plaintiff has never actively engaged in the farming of its lands but has always leased the lands to tenants. All of the plaintiff's lands involved are reasonably necessary for the conduct of plaintiff's business.

It is conceded that it has been heretofore lawful for a corporation organized for that purpose to engage in the real estate business, including the buying and selling of farm lands and the renting and operating of said farm lands while owned by the corporation. Did the people of the State of North Dakota when they adopted the so-called Anti-Corporation Farming Act intend to forbid all corporations from engaging in the farm real estate business? Or was it, rather, the intention of the people to prohibit corporations, both domestic and foreign, who were engaged in some other principal business, from holding farm property for a longer period than provided in said act? Had the people intended to make it unlawful for any corporation to engage in any farm real estate business, why was the following exception placed

in the law, to-wit: 'except such as is reasonably necessary in the conduct of their business'? Had the people in the initiated measure, or the Legislature, desired to make it unlawful for any corporation, either foreign or domestic, to engage in the business of owning or operating farm property or to engage in the business of buying or selling farm property, it could have been clearly expressed in the law. If such a law had been enacted, it undoubtedly would have been constitutional and upheld by the courts.

There is no question but that the lands involved in this action are necessary in the conduct of plaintiff's business. If the plaintiff is to continue in the business of buying and selling farm lands it will be necessary to have said lands farmed while owned by the corporation. It appears to the Court, therefore, that the lands here involved fall within the exception as expressed in the so-called Anti-Corporation Farming Act. To hold otherwise would by implication extend the actual provisions of the Act. It is not the purpose of the courts to legislate. See the following cases:

Ronaldson & Puckett Co., Ltd. v. Bynum, 48 So. 152;

Sylvester Watts Smyth Realty Co. v. American Surety Co. of New York, 238 S.W. 494;

Cree v. Associates Co., 234 S.W. 288.

The Court will, therefore, sign an order overruling the defendants' demurrer, with leave to the defendantants to serve and file an answer within twenty days.

Dated at Wahpeton, North Dakota, this 16th day of September, 1942.

BY THE COURT:

Wm. H. Hutchinson, Judge."

The Baldwin case thereafter proceeded to final judgment in favor of the plaintiff and the Attorney General did not appeal.

A similar result was reached in the case of Northwestern Improvement Company v. Morton County (District Court Morton County, North Dakota), Hon. H. L. Berry, Judge, which proceeded to final judgment in favor of the corporation for an injunction, and in which case the Attorney General took no appeal.

Hence, it is to be observed that if the object of the law is to prohibit corporate ownership, such result is not accomplished but rather that there is no valid classification and there is discrimination in fact.

(c) Section 5 of the Act (page 4 hereof) permits cooperative corporations, 75% of whose members are stockholders, are actual farmers residing on farms or depending principally on farming for their livelihood to acquire and hold real estate without limitation. It is not necessary that the members or stockholders be actual farmers residing on farms. Real estate speculators who may use the cooperative form of incorporation, and who confine their activities to income from farm lands, may successfully operate under this law without regulation of any kind.

Upon consideration of the foregoing propositions we respectfully contend that the law does not provide for

a valid classification but results in unconstitutional discrimination within the meaning of the Fourteenth Amendment.

The Supreme Court of North Dakota held, on the authority of Blake vs. McClung, 172 U.S. 239, that appellant was not "within the jurisdiction". The fact is, however, that Asbury Hospital, a Minnesota corporation, was effectively within the State because it owned thirty or more parcels of land within the State of North Dakota, (R. 5). Its property was there, and it is that property against which this Act was directed. As a foreign corporation it was not eligible to qualify as such and did not need to do so under North Dakota statutes. (See this Brief, page 8).

The rule in Blake v. McClung, supra, was distinctly qualified by this court in Kentucky Finance Corporation v. Paramount Auto Exchange Corporation, 262 U.S. 544. In that case this court held that a corporation is a person within the meaning of the due process and equal protection clauses of the Fourteenth Amendment, and that where a foreign corporation goes into a state to recover possession of property taken from it within that state, it is "within the jurisdiction" within the meaning of that amendment.

Certainly, in the instant case, Asbury Hospital possessing real property within this jurisdiction, should be held to be within the State so as to be entitled to claim the benefits of constitutional safeguards as affecting such property.

(d) There is, we submit, no valid basis for the discriminatory classification as between corporations as

heretofore pointed out. Corporate ownership by some corporations is condemned, and without valid reason, corporate ownership by others is permitted. This discrimination, we contend, is invalid and contrary to the Fourteenth Amendment upon the authority of Connolly v. Union Sewer Pipe Company, 184 U.S. 540. In that case the Court said:

> "The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis, ... But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this . . . . No duty rests more imperatively upon the courts than the enforcement of these constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary 'selection'."

Arbitrary discrimination denies the equal protection of the laws.

Brown v. Jacobs Pharmacy Co. 115 Ga. 429, 41 S.E. 553
State v. Cudahy Packing Co. 33 Mont. 179, 82 Pac. 833
Kellyville Coal Co. v. Harrier, 207 Ill. 624, 69 N.E. 927
Weco Products Co. v. Reed Drug Co. — Wis. —, 274 N.W. 426
Cotting v. Kansas City Stockyards Co., 183 U.S. 79
Southern Ry. Co. v. Green, 216 U.S. 400
Davidow v. Wadsworth Mfg. Co. 211 Mich. 90, 178 N.W. 776
Gulf, Colo. & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150
Power Mfg. Co. v. Saunders, 274 U.S. 490
Quaker City Cab Co. vs. Pennsylvania, 277 U.S. 389

II.

THE LEGISLATION IMPAIRS THE OBLIGATION OF CONTRACT WITHIN THE MEANING OF ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES.

The lower court found that Asbury Hospital in 1927 had the right to and was permitted by the State of North Dakota to acquire the real estate in question without limitation or restriction of any kind. It was permitted to acquire a fee simple title which was absolute and unconditional. (R. 2-3). When the real estate was acquired there existed in North Dakota no law or statute restricting or forbidding appellant's ownership of the real estate (R. 3).

Asbury Hospital was a nonprofit corporation and was created and existed for religious and charitable purposes solely (R. 1-2). As a foreign corporation it was neither eligible nor required to qualify as such by North Dakota statutes (See page 8 of this brief).

Appellant therefore acquired this property free from restriction, with the full consent and permission of the State of North Dakota. It obtained a vested right in the property with the consent of the State. As heretofore pointed out in this brief, this right of property included the right on the part of appellant to sell and dispose of it when and upon such terms as appellant might elect. These circumstances, we submit, implied a contract which may not be impaired by subsequent legislation in view of Article 10, Section 1 of the Constitution of the United States.

That an implied contract may exist under similar circumstances is recognized in the following decisions:

Seaboard Air Line Ry. Co. v. Railroad Commission (C.C. Ala.) 155 Fed. 792, 802

Herndon v. Chicago Rock Island Pac. Ry. Co. 218 U.S. 135

St. Louis & S.F. R. Co. v. Cross, Sec'y. (C.C. W.D. Okla.), 171 Fed. 480

Western Union Tel. Co. v. Kansas, 216 U.S. 1

The Supreme Court of North Dakota denied appellant's contention. We urge that it erred in refusing to hold that there was an implied contract between the state and the corporation when it allowed Asbury Hospital, with its permission, to acquire this property, that it would not take or confiscate that property.

CONCLUSION

The North Dakota Supreme Court rested its decision in large part upon the decision of this court in the case of Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129. That case, we submit, does not sustain the decision of the court below for the following reasons:

1. There was in that case no taking away or confiscation of the tangible property of the corporation; the statute in question merely enjoined the corporation from using the property as a cotton gin.

2. The Act was sustained as a valid exercise of the police power.

In the instant case, there is no question of police power. The court below did not mention the subject. Obviously there is no basis of fact or law for the exercise of the police power under the circumstances, because an analysis of the statute indicates clearly that corporate ownership as such is not legislated against, but only certain classes of corporate ownership are singled out for regulation.

In the case of State vs. Klein, 63 N.D. 514, 525, the exercise of the police power was urged as a reason for sustaining the statute in question which enlarged the period of redemption after foreclosure of a mortgage. In that case Judge Burr pointed out that in North Dakota under the peculiar provisions of its constitution, the State may not, even under its police power, take property without due process of law. (See Article I, Declaration of Rights, Constitution of North Dakota, Section 24). For that obvious reason, that Court did

not attempt to base its decision upon any assertion that it was a police power measure.

The judgment appealed from should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 35

ASBURY HOSPITAL, A CORPORATION
APPELLANT,

-vs.-

CASS COUNTY, NORTH DAKOTA, A PUBLIC CORPORATION, ET AL.
APPELLEES.

BRIEF OF APPELLEES

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 35

ASBURY HOSPITAL, A CORPORATION
APPELLANT,

-vs.-

CASS COUNTY, NORTH DAKOTA, A PUBLIC CORPORATION, ET AL.
APPELLEES.

BRIEF OF APPELLEES

JURISDICTION

The appellant predicates jurisdiction of the Supreme Court of the United States upon Section 237a (U. S. Code), which provides that a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had ******** where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error.

It is well settled that a corporation is not a citizen within the meaning of Section 2 of Article 4 of the

Constitution of the United States, or of Section 1 of Article 14 of the Amendments to the Constitution, as to privileges and immunities of citizens. Orient Ins. Co. v. Daggs, 172 U. S. 557; 43 L. ed. 552; Waters Pierce Oil Co. v. Texas, 177 U. S. 28; 44 L. ed. 657; 12 Am. Jur. 100; 23 Am. Jur. 259; 8 Fletcher, Cyc. Corp. 449.

The Appellees contend, therefore, that the facts alleged in the appellant's bill of complaint, and which are admitted by the demurrer of the appellees, establish that the issues raised thereby are not of such character as would bring them within the provisions of Section 237a (U. S. Code). The theory of the appellees upon the question of jurisdiction will be developed and considered in the course of the argument in our brief.

STATEMENT OF THE CASE

The statement of the case in appellant's brief is substantially correct, and, therefore, we do not deem it necessary to make a further statement here.

ARGUMENT

Appellant bases its argument for reversal of the decision of the court below upon two main points:

I. As applied to appellant's property acquired before the passage of the corporation farm land act, the legislation is in contravention of the 14th Amendment.

II. The legislation impairs the obligation of contract within the meaning of Article 1, Section 10 of the Constitution of the United States.

We shall consider these points in their order.

Briefly stated, the challenged act provides: Corporations which acquired farm lands in the state of North

Dakota prior to its effective date must sell or dispose of same within ten years after said date, but may farm the land during the ten year period.

Corporations, domestic or foreign, acquiring land in the state in any manner since the approval and adoption of said act are subject to all the provisions thereof; that is, they must dispose of the land within ten years after acquisition thereof, whether such lands were acquired by judicial process, operation of law or in any other manner.

If lands are not disposed of within said ten year period, the county is required to bring action for the escheat of the title, and within one year sell the land to the highest bidder, and the proceeds paid to the corporation, less the costs and expenses of sale.

Corporations may retain such lands as are necessary in carrying on their business.

The act does not apply to cooperative corporations if 75 per cent of the members are farmers or principally dependent upon farming for their livelihood.

POINT I

Appellant's first contention under Point I is that the requirement that it must dispose of its property within ten years is an infringement upon vested property rights. Section 131 of the Constitution of the State of North Dakota provides that, "the legislative assembly shall provide by general laws for the organization of all corporations hereafter to be created, and any such law, so passed, shall be subject to future repeal or alteration."

Section 136 of the Constitution of North Dakota provides that, "No foreign corporation shall do busi-

ness in this state without having one or more places of business and an authorized agent or agents in the same, upon whom process may be served."

Section 137 of the Constitution of North Dakota provides that, "No corporation shall engage in any business other than that expressly authorized in its charter."

The appellant is a foreign corporation organized under the laws of the state of Minnesota. It is created and exists for charitable and religious purposes solely. It is purely a Minnesota corporation and has no right to do business in the state of North Dakota. It is true that it acquired certain real property in the state of North Dakota, but it did so by sufferance and not because it had any rights under its Minnesota charter to do so. When it acquired this property in North Dakota, it did so subject to the right of this state to assert its reserved power whenever it saw fit so to do. The appellant certainly had no greater right or privilege than corporations organized under the laws and Constitution of North Dakota.

"Corporations are the creations of the state endowed with such faculties as the state bestows and subject to such conditions as the state imposes." 13 Am. Jur. 234.

"A corporation can have no legal existence beyond the bounds of the state or sovereignty which created it, and although it may act in another state or country, it cannot do so as a legal or constitutional right, but only by the comity or consent of such state or country." 20 C. J. S. 12.

Appellant's charter was granted by the state of Minnesota and it exists solely for religious and charitable purposes. There is no charter nor contract between

appellant and the state of North Dakota. The fact that appellant happened to acquire land in North Dakota does not establish a contract with, or an obligation upon, North Dakota. The only implied right that the appellant could have with respect to land was to acquire and hold only so much as was necessary to the conduct of the business authorized by its charter, and such business could not be conducted in North Dakota without first complying with the laws governing admission into the state of foreign corporations. It is conceded that the appellant never complied with, or attempted to comply with such provisions.

The fact that the North Dakota law is held to apply to appellant does not infringe upon any of its vested rights, since it has none in the state. Subject to constitutional limitations that a state cannot exclude a corporation engaged in interstate commerce, or is a corporation that is an agency or instrumentality of the Federal government, a state may prohibit foreign corporations from doing business therein, or it may make the right to do business therein depend upon such terms and conditions as it may in its discretion see fit to impose. 20 C. J. S. 30; 23 Am. Jur. 224; Crescent Cotton Oil Co. v. Miss. 257 U. S. 129; 66 L. ed 166; 20 C. J. S. 32.

In the case of Crescent Oil Co. v. Miss. supra, a law enacted by the state of Mississippi designated as "Anti-Gin Act" was upheld by the Supreme Court of the United States. It prohibited corporations, whether organized under the laws of that state or authorized under the laws thereof, to do any local business therein, among other things, from owning or operating any cotton gin when such corporation was interested in the manufacture of cotton-seed oil or cotton-seed meal. A

penalty was provided for violation of the act, but corporations were permitted to operate their gins for a reasonable time until they might be sold.

The plaintiff in error, a corporation, organized under the laws of Tennessee, prior to the enactment of said Anti-Gin Act owned and operated a cotton-seed oil mill at Memphis and two cotton gins in Mississippi. Disregarding the Anti-Gin Act it continued to operate its two gins in Mississippi until 1915, when, for the purpose of enforcing the law, the state on the relation of its Attorney General instituted a suit in equity against the company in the county court of chancery, which resulted in a decree that the act was constitutional and that the plaintiff in error was guilty of violating it.

The plaintiff in error contended that the statute was unconstitutional in that it imposed a direct and substantial, and therefore an unconstitutional burden upon an instrumentality of interstate commerce, and that it was applicable to corporations and not to individuals owning and operating cotton gins, and that therefore it denied the plaintiff in error the equal protection of the law. In the opinion of Justice Clarke, we find the following statement:

> "Where, as we have found in this case, a foreign corporation has no Federal right to continue to do business in a state, and where, as here, no contract right is involved, and there is no employment by the Federal government, it is the settled law that a state may impose conditions, in its discretion, upon the right of such a corporation to do business within the state, even to the extent of excluding it altogether. Horn

Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 83, 58 L. ed. 127, 133, 34 Sup. Ct. Rep. 15, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions applicable to corporations only. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 343, 344, 53 L. ed. 530, 541, 542, 29 Sup. Ct. Rep. 370; Baltic Min. Co. v. Massachusetts, supra."

We quote further from paragraph 6 of the syllabus:

"Any classification adopted by a state in the exercise of its police power to prevent a practice conceived to be promotive of monopoly, with its attendant evils, and which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the laws clause of U. S. Const., 14th Amend., and every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed."

We submit that the holding in the Crescent Oil Co. v. Miss., supra, supports the contention of the appellees as to the validity of the North Dakota corporation farm act.

Counsel for appellant cites the case of Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, and quotes from the opinion of Justice Day as supporting appellant's contention that the North Dakota law is violative of the 14th Amendment. That case, however, is not in point

since it was decided on an entirely different state of facts from those presented in the case at bar.

The city of Louisville, Kentucky, passed an ordinance which provided, among other things, that it shall be unlawful for any colored person to move into and occupy as a residence, place of abode or to establish and maintain a place of public assembly, any house upon any block upon which a greater number of houses are occupied as residences, places of abode or places of assembly by white people than are occupied as residences, places of abode or places of public assembly by colored people.

Buchanan, the plaintiff in error, a colored person, had entered into a contract with the defendant, in error, Warley, for the purchase of certain real estate in a block in which the greater number of residents were white people. The defendant in error refused to convey, basing his refusal upon the ordinance quoted, and the plaintiff in error brought action for specific performance. The Kentucky court upheld the validity of the ordinance, but an appeal to this court was taken and the judgment of the Kentucky court was reversed.

As will be observed, the controversy in this case did not turn upon the right of corporations to hold property, but upon the right of natural persons. The case, therefore, is of no value in determining issues involved here.

Counsel for appellant also cites the following cases:

Spann v. Dallas, 111 Tex. 350, 235 S. W. 513; Ochoa v. Morales, 230 U. S. 139, 57 L. ed. 1427; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355; Chicago, Milwaukee & St. Paul R. Co. v. Wisc., 238 U. S. 491, 59 L. ed. 1423; State v. Neff, 52 Ohio St. 375, 40

N. E. 720; Gilman v. Tucker, 128 N. Y. 190, 28 N. E. 1040; Mulford v. Curry, 163 Cal. 276, 125 Pac. 236.

We are in agreement with the principles announced in the foregoing cited cases, but the facts are neither analogous to nor parallel with the facts in the case at bar.

The case of Spann v. Dallas, supra, involved the validity of a city ordinance prohibiting the owners of land or lots from constructing certain buildings thereon, except upon the consent of three-fourths of property owners owning property within the district and upon approval of the design of the building by the building inspector. Under said ordinance, no rule, no standard or no regulation of any kind was given whereby an applicant for a building permit may know to what particular design or building he must conform. If the design, whatever its merits, did not suit the inspector, it was within his uncontrolled power to prohibit the building. The courts of Texas upheld the validity of the ordinance, but the judgment was reversed by this court. The ordinance was held void in that it left the right to construct a building subject to the caprice or arbitrary discretion of the inspector.

In the case of Ochoa v. Morales, supra, one Rai Mundo Morales, natural grandfather of the complainants in the case, had fraudulently gained title and possession of certain premises in Porto Rico. He mortgaged the premises to Ochoa and thereafter transferred the property to the mortgagee in satisfaction of the mortgage debt. The persons legally entitled to the property brought an action in the courts of Porto Rico to set aside the transfer on the ground of fraud, and judgment was entered in their favor. The case was appealed to the Supreme Court of the United States, where the

judgment was affirmed. As will be seen, the facts are entirely different from the facts in the case at bar, and the decision in the case certainly cannot be considered as an authority for appellant.

The issue in the case of Western Union Telegraph Co. v. Kansas, supra, was as to the validity of a Kansas statute which provided that each corporation authorized to do business in the state, before filing its charter with the Secretary of State, was required to pay the State Treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of 1/10 of 1 per cent of its authorized capital, upon the first $100,000 of its capital stock, or any part thereof; and upon the next $400,000, or any part thereof, 1/20 of 1 per cent; and for each million or major part thereof over and above the sum of $500,000, $200. The statute also provided that failure to make such payment shall work a forfeiture of the right of the corporation to do business in the state. Under the provisions of said statute, a foreign corporation was prohibited from doing business in the state, unless it first paid into the state school fund a tax of a certain percentage of its capital representing all of its business, property and interests not only in the state of Kansas, but in every other state where the company did business. It was therefore a tax and burden upon interstate commerce and was held to be in violation of the commerce clause of the Constitution of the United States. As may readily be seen, the decision in that case is no authority for the contention of the appellant in the case at bar.

In the case of Chicago, Milwaukee & St. Paul R. Co. v. Wisc., supra, a statute was challenged which prohibited the letting down of an unengaged and unoccupied upper berth in a sleeping car when the lower

berth in the same section was occupied, and provided a penalty for violation thereof. The statute was upheld by the Supreme Court of the state of Wisconsin, but reversed by the United States Supreme Court as being contrary to the due process clause of the 14th Amendment to the United States Constitution.

We see no parallel between the purpose and intent of the Wisconsin law and the North Dakota corporation farming statute.

The case of State ex rel. White v. Neff, supra, cited by counsel for appellant, arose out of an entirely different state of facts than those involved in the case at bar. Cincinnati college was a college corporation created by the laws of the state of Ohio with perpetual succession. The funds or stock of said college consisted of 5000 shares at $25 each. The directors of the college were elected by the stockholders for specified terms. The college as such had such powers as is ordinarily enjoyed by institutions of that nature.

After the establishment of Cincinnati college, the legislative assembly of the state of Ohio in 1892 enacted a statute transferring the control and management of Cincinnati college to the directors of the University of Cincinnati. The question involved and the issue raised was as to whether or not this statute was in conflict with Section 19 of Article 1 of the Constitution of the state of Ohio, which provided that, "Private property shall ever be held inviolate." The effect of the Ohio statute of 1892 was to take the property of Cincinnati college and donate it to the University of Cincinnati.

The Supreme Court of Ohio held that the result of the statute passed April 15, 1892, relating to the Cincinnati

college, which in terms gives absolute control and management of the affairs and property of Cincinnati college to the directors of the University of Cincinnati, is to take the property of the former and donate it to the latter institution. The statute, therefore, was in conflict with Section 19 of Article 1 of the Constitution of the state of Ohio, and was therefore void.

The effect of the Ohio statute which was held to be void was deliberately to seize the property of one corporation without any compensation and donate it to another corporation. There is, of course, no similarity between the facts and the issues in that case and the facts and the issues of the case at bar.

The case of Gilman v. Tucker, supra, cited by counsel for appellant, is not in point. The question involved in that case was as to the validity of a statute of the state of New York relative to the sale and redemption of real property, sold on execution, which provided that if the title of the grantee in the sheriff's deed, executed in pursuance of the sale, or his assignees, is adjudged to be void in any action for that purpose brought by the judgment debtor, such judgment shall have no effect unless, within twenty days after the entry of such judgment, the plaintiff shall pay to such grantee, or his assigns, the sum which was paid on the sale, with interest, including the costs and expenses of the defendant in defending the action in which such judgment was recovered, and on failure to make such payment, title shall be valid in the grantee.

In other words, said statute would compel a judgment debtor to pay the expenses of sale as well as the purchase price at the sale, notwithstanding such sale was had under a judgment which was in fact null and

void and of no effect. It was, therefore, held that the enforcement of such a statute would be taking of property without due process of law.

The case of Mulford v. Curry, supra, involved the validity of a California statute entitled, "An act relating to revenue and taxation, providing for a license tax upon corporations." It provided that it shall be the duty of every corporation incorporated under the laws of this state, and of every foreign corporation now doing business, or which shall hereafter engage in business in this state, to procure annually from the Secretary of State a license authorizing the transaction of such business in this state, and shall pay therefor a license tax as follows: When the authorized capital stock does not exceed $10,000, the tax shall be $10. The fee then increases progressively, and when the stock is five million dollars, the tax shall be $200, and when the capital stock exceeds five million dollars, the tax shall be $250. The Supreme Court of California took original jurisdiction in a suit for mandamus brought by the plaintiff corporation against the Secretary of State to compel him to receive and file a certain document, designating and appointing an agent of the corporation upon whom process might be served, but without payment of the tax. Payment of the tax was refused on the ground that it was a tax upon the property of the corporation not only in the state of California but upon its property in every state in which it did business, and that, therefore, it was a burden upon interstate commerce. The Supreme Court of California granted the petition of the corporation and issued the writ on the ground that the tax and fee so to be collected by the state was an illegal interference with interstate commerce.

Appellant relies upon the case of Louisville Joint Stock Land Bank v. Radford, 295 U. S. 572, 79 L. ed. 1593, which held unconstitutional the so-called "Frazier-Lemke Act of June 28, 1934". Appellees submit, however, that the case is not in point here. Justice Brandeis, who wrote the opinion in that case, analyzed the statute involved as follows:

> "1. The right to retain the lien until the indebtedness thereby secured is paid.
>
> 2. The right to realize upon the security by a judicial public sale.
>
> 3. The right to determine when such sale shall be held, subject only to the discretion of the court.
>
> 4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.
>
> 5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

It will be readily observed that there is no parallel between the issues involved in the Radford case, supra, and in the case at bar since the appellant is entitled to the proceeds of the sale of the land involved.

As to the right to determine when such sale shall be held under the statute involved, such sale must be had within one year after the escheat judgment and, therefore, it cannot be successfully maintained that the

plaintiff will be prejudiced by an unreasonable length of time before it may realize upon the proceeds of the sale.

There is nothing in the North Dakota law which prohibits the corporation involved from being a bidder at the sale under the escheat judgment, and, therefore, it may protect its rights and prevent a sale of the land at the price less than what, in the judgment of the corporation, is its value.

As to the rents and profits, if any there be, during the escheat proceedings, as we have pointed out, the court will undoubtedly require an accounting thereof to be made to the corporation.

We submit, therefore, that the case of Louisville Joint Stock Land Bank v. Radford, supra, is not in point and does not support appellant's theory in the case at bar.

The appraisal of land through judicial proceedings at the price less than the amount of the indebtedness for which such land stands as security does not constitute taking of property without due process of law.

In the case of Wright v. Union Central Life Ins. Co. 311 U. S. 276, 85 L. ed. 184, involving the validity of the Frazier-Lemke Act (Sec. 75s of the Bankruptcy Act), this court held that a debtor who had availed himself of the provisions of the act was entitled to have the property reappraised or the value fixed by the court upon a hearing, and that the value having been determined at such hearing, he was then entitled to a reasonable time, fixed by the court, in which to redeem at such reappraised value, fixed by the court, and that if he did so redeem, the land should be turned over to him free and clear of encumbrances and his discharge granted.

While the case is not directly in point, yet we submit that the principle announced supports the theory of the appellees in this case, and that a public sale as provided by the North Dakota statute is not violative of the constitutional rights of the appellant.

The appellant acquired certain real property in North Dakota prior to July 29, 1932, which is the effective date of the statute challenged. The appellant and all corporations, domestic or foreign, which acquired land in North Dakota prior to July 29, 1932 are required to sell or dispose of same within ten years after the effective date of the act, except such land as is reasonably necessary in the conduct of their business. (Section 10-0602 of the North Dakota Revised Code of 1943.)

Section 10-0603 of the act provides that any corporation, either domestic or foreign, which, on or since July 29, 1932, has acquired or hereafter shall acquire any rural real estate, used or usable for farming or agriculture, by judicial process or operation of law shall dispose of such real estate, except such as is reasonably necessary in the conduct of its business, within ten years from the date that it was so acquired. During said ten year period the corporations may farm and use such lands for agricultural purposes.

Section 10-0605 of the act provides that the title and ownership to any real estate acquired in any manner by any domestic or foreign corporation since the approval and adoption of the initiated law of June 29, 1932 shall be valid for all purposes, notwithstanding any provisions in said initiated law contained, subject, however, to all of the provisions now contained in this chapter.

When the appellant acquired land in the state of North Dakota, it did so not as a matter of right, but through comity or acquiescence, or under a license without consideration, and acquired no rights binding upon the state. Whatever rights it may have acquired were subject to the constitutional and statutory provisions of the state. It was bound to take notice of the constitutional provisions and reserved power of the state. It had constructive notice of Section 131 of the Constitution of North Dakota, which provides that the legislative assembly shall provide by general law for the organization of all corporations hereafter to be created, and any such law, so passed, shall be subject to future repeal or alteration. The appellant, therefore, had constructive notice that the legislative assembly of the state of North Dakota, under the provision of the Constitution quoted, had the power to pass any law regulating and controlling the activities of corporations, domestic and foreign, and might prohibit them from doing business in the state so far as such prohibition was not violative of the Federal Constitution.

As was said in the case of Paul v. Virginia, 8 Wall. (75 U. S.) 168, 19 L. ed. 357:

> "The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta vs. Earle, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of

its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

And then also:

"'A foreign corporation doing business in a State through comity or acquiescence, or under a license given without valuable consideration, has no contract binding the State not to exercise its powers to exclude it.' 23 Am. Jur. 224, see also 20 CJS pp. 31 et seq.; 17 Fletcher, Cyc. Corp. pp. 797 et seq. In such case, the state may repeal at any time a statute granting permission to do such business, and may withdraw or revoke such license, and may withdraw its implied consent to a foreign corporation which has been allowed on principles of comity to engage in business therein without express permission and may evict such corporation, provided its action does not operate to deprive the corporation of its property without due process, obstruct or burden 'interstate or foreign commerce, or impede business conducted by Federal authority.' 23 Am.

Jur. 224, 225; 17 Fletcher, Cyc. Corp. pp. 797, 798; 20 CJS pp. 31 et seq.; National Council vs. State Council, 203 US 151, 51 L. ed. 132, 27 S. Ct. 46; Crescent Cotton Oil Co. vs. Mississippi, supra."

We quote also from the case of Asbury Hospital v. Cass County, et al., supra, (R. 46); 23 Am. Jur. 223:

> "Of course, where a foreign corporation is admitted to a State, not as a mere licensee, but upon terms and conditions which create a contract between the corporation and the state, the state may not impair the obligations of such contract. But, even where there may be said to be a contract between the state and a foreign corporation, the State may have reserved the power to alter the conditions on which the corporation is permitted to do business, or to revoke the right to do business in the State at all."

It is true that the reserved power of the state to amend corporate charters is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted, to take property without compensation, or arbitrarily to make alterations that are inconsistent with the scope and object of a charter, but the provision of the Federal Constitution which prohibits states from passing any law impairing contract obligations does not preclude a state which has reserved power to alter the charter of a corporation from doing so. Phillips Petroleum Co. v. Jenkins, 297 U. S. 629, 80 L. ed. 943.

In the case of Phillips Pet. Co. v. Jenkins, supra, the appellant complained that a statute of the state of Arkansas made corporations liable for personal in-

juries sustained by an employee, through negligence of another employee, while as to individual employers, it left in force the common law rule that every servant assumes the risk of injuries through the negligence of his fellow servants. In the opinion of this court, written by Mr. Justice Butler, we find the following:

> "Arkansas might have refrained from enactment of statutes creating or authorizing organization of corporations and might have denied to foreign corporations admission to the State. But it may not enforce any part of the charter of a domestic corporation or any provision of its laws relating to admission of a foreign corporation that is repugnant to the Federal Constitution. If Sec. 7137 is repugnant to the equal protection clause, it is without force as a part of the charter contract or otherwise."

Statutes prohibiting corporations from holding real estate, or restricting the holding thereof to a certain number of years, are not new. The National Banking Act, 12 U. S. C. A. 29, as amended, prohibits national banks from holding real estate more than five years. In the opinion of the United States Supreme Court in the case of Union National Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188, we find the following:

> "The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter of the statute, constitutes the law."

In Vol. 6, Fletcher Cyc. Corp., page 681, Sec. 2802, we find the following general statement:

> "The quantity of real property which a corporation may purchase or hold is sometimes expressly limited to that which is reasonably necessary to its corporate purposes. Very often, too, there are provisions in the constitutions or statutes which directly or by necessary implication require surplus or unnecessary property to be disposed of by the corporation, within a fixed period of time, such as five years, or six years, or ten years, or some other designated number of years. Such provisions are apparently designed to prevent accumulations of real property by corporations and in this respect are akin to the early English statutes of mortmain. They cannot be evaded by causing the title to be taken by a dummy corporation. Real property is held by a corporation in violation of such prohibitions where it is taken by the company with the fixed purpose and intention of being held as an investment, and not to be employed in a necessary or proper use in carrying on the business of the corporation."

We submit that the North Dakota statute challenged by the appellant is not violative of the 14th Amendment to the Constitution of the United States. It is conceded that the land acquired by the appellant in the state of North Dakota was acquired in 1925 for investment solely. Under the statute, it was given ten years from the effective date of the Act in which to sell or dispose of the property. During that time it could dispose of the property in the open market, and the presumption is that at a public sale it would bring its

market value. Ten years certainly would be a reasonable time under all of the circumstances in which to dispose of the property. It is difficult to conceive that a loss could be sustained since the property was first acquired through an assignment to the appellant of a real estate mortgage. When a loan is made upon a parcel of land, as a general rule the loan is conservative when compared with the value of the land, and usually does not exceed fifty per cent of its value, and it certainly may be assumed that at a public sale the land would bring at least the amount that the appellant had invested therein. We submit, therefore, that there is no force to appellant's argument that when it was compelled to sell its property within ten years it was thereby deprived of the right to determine when or what price, or to whom the property might be sold, because, as has been pointed out and conceded, it is held merely as an investment in the first instance. It would seem clear, therefore, that the state, under its reserved power, had the constitutional right to fix a reasonable time within which the appellant, and other corporations similarly situated, should dispose of their real estate holdings in the state.

The appellant contends that since it was authorized under its articles of incorporation to acquire and hold real property, the land in question falls within the exception in the North Dakota statute authorizing corporations to continue to hold such real estate as is reasonably necessary in the conduct of their business.

As we have pointed out, the appellant is a Minnesota corporation, and its charter was granted by that state. It acquired land in this state through comity or acquiescence. Even if the exception of the North Dakota law should apply; namely, that it may hold such real estate

as is reasonably necessary in the conduct of its business, it cannot be successfully maintained that real estate acquired in this state for the purpose of investment is reasonably necessary in the conduct of its business. On the effective date of the North Dakota statute the appellant owned and held real estate of the character specified in the statute. This real estate was not necessary in the conduct of its business. It was agricultural land, and under the provisions of the statute, the corporation was required to dispose of it within ten years from the effective date of such statute.

Corporations are organized for the purpose of carrying on certain business activity authorized by their charter. They are granted powers to be used in the performance of the functions for which they are organized. As was said in the North Dakota case, Asbury Hospital v. Cass County, et al., 72 N. D. 359, 7 N. W. 2d 438: (R 41)

> "There is an obvious distinction between the objects or business which a corporation is organized to accomplish or conduct and the powers with which it is vested for the purpose of conducting the business or attaining its objects. When the statute provides that there shall be excepted from its operation such real estate as is reasonably necessary in the conduct of the business of a corporation, it means such real estate as is reasonably necessary for carrying on the business or activity which the corporation was created to carry on. 6 Fletcher, Cyc. Corp. pp. 170, 171, Section 2475; 17 Fletcher, Cyc. Corp. pp. 471-474; General Conference vs. Berkey, 156 Cal. 466, 105 P. 411; Major Creek Lumber Co. vs.

Johnson, 99 Or. 172, 195 P. 177; Alpena Portland Cement Co. vs. Jenkins & R. Co. 244 Ill. 354, 91 N. E. 480; Friedlander Bros. vs. Deal, 218 Ala. 245, 118 So. 508."

It will be seen, therefore, that there is a clear distinction between the purposes for which a corporation is organized, and the powers that it may exercise. It may have the power to do certain things which are not a part of the business which it was authorized to conduct under the provisions of its charter. 17 Fletcher, Cyc. Corp. pp. 471-474.

The case of General Conference v. Berkey, 156 Cal. 486, 105 Pac. 411, we believe is squarely in point on this proposition. The General Conference of Free Baptists was a foreign corporation organized under the laws of Maine. It owned a lot in the city of Sacramento which it sold. The question raised was whether the sale of this lot constituted "transacting business" or "doing business" by the General Conference of Free Baptists in the state of California. We quote from the opinion of the court:

> "It remains to be considered, then, whether a sale of real estate by such a corporation is a transaction of business by it within the meaning of the constitutional provision above referred to. The phrase 'to transact business,' as used in this provision, is equivalent to the words 'to do business,' found in the statutes of many states, prohibiting a foreign corporation from 'doing business' in such states until it has filed a certificate designating a place of business and a resident agent upon whom process may be served, or complied with other conditions, **** 'This corporation was certainly not engaged in the busi-

ness of buying and selling land. As we have said, in another connection, its charter plainly indicates that the power conferred upon it to make such purchase and sale was not granted for the purpose of enabling it to do such acts as a means of making a profit thereon. The buying and selling permitted to it were merely incidental to the carrying on of the main purposes of the corporation. A distinction is to be drawn between the purposes of a corporation and its powers (Floyd vs. Perrin, 30 S. C. 1, 12, 8 S. E. 14, 2 LRA 242). The purposes of the plaintiff, as defined in the articles of incorporation, are 'religious, missionary, educational and charitable.' As incidental to these purposes, it is granted a variety of powers, i. e., the power to prosecute and defend suits at law, the power to use a common seal, the power to take and hold for the objects of said corporation any real or personal property, and the power to sell and convey any estate which the interests of the corporation may require to be sold and conveyed. All of these powers are to be exercised in subordination to the main purposes as first declared. The purchase and sale of property by such a corporation is not one of the ends for which it is organized, but is merely a means to enable it to accomplish those ends. Property is to be acquired only for the objects of the corporation, and to be sold only when the interests of the corporation require such sale. The power to sell property by a corporation of this character is as purely incidental to the prosecution of its main purposes as are the other powers enumerated in the charter, as, for example, the power to

prosecute and defend suits at law. It is quite generally held that the mere prosecuting or defending of suits by a foreign corporation is not 'doing business,' within the meaning of statutes of the kind we have been discussing."

Appellant's second contention under Point I is that the North Dakota law deprives it of the use if its property during the period from the time of escheat to the date of public sale by the county. It is the contention of the appellees that the provision of the statute that such real estate shall escheat to the county is not intended to deprive the corporation of the benefits derived from the land during the period mentioned. The county is not bringing the escheat proceedings on the theory that the corporation is indebted to the county upon any account or tax, or other obligation. The escheat proceedings are entirely different from county tax deed proceedings where counties, through statutory preceedings, take title to real property for the purpose of collecting delinquent taxes. The purpose of the escheat proceedings is simply to give the county title and possession to enable it, upon sale thereof, to give a good and sufficient title to the purchasers. The proceedings will be had in courts having equitable jurisdiction, and it is fundamental that a court of equity will protect the right of any person or corporation involved in any matters or in any controversy before it, and in which it has jurisdiction. Furthermore, the land will be sold at public auction to the highest bidder. There is nothing in the statute which would prevent the corporation from being a purchaser at the sale at a price which it considers the reasonable value of the property.

The time that may elapse between the judgment of escheat and the sale of the property involved cannot

exceed one year, and the presumption is that the sale will be had and will be completed within that time. Undoubtedly if there are growing crops upon the premises involved, accounting of same will be made to the corporation whose land was sold because, as we have pointed out, the escheat proceedings are not brought for the purpose of collecting a debt or enforcing a financial obligation from the corporation to the county. As a matter of law, the corporation is entitled only to the value of the property, and when the value in money has been paid to the corporation it can have no further legal claim.

It is the contention of the appellees, therefore, that the effect of escheat proceedings does not deprive the appellant of due process guaranteed by the Constitution. As was said in the case of Asbury Hospital v. Cass County, et al., 72 N. D. 359, 7 N. W. 2d 438: (R. 54)

> "The statute does not purport to divest a corporation of title to land which it holds beyond the prescribed period: It makes such holding the ground for an action to effect the escheat; but the corporation continues to own and hold the property until title thereto is divested by judgment rendered in the action brought pursuant to the statute. 19 Am. Jur. 399, Sec. 33. The corporation must be made a party to the action. It will have full opportunity to be heard in defense. It goes without saying that judgment to effect escheat may be rendered only if the cause of action is established. If the cause is established and judgment to effect ascheat, rendered, the county must dispose of the land within one year 'at public auction to the highest bidder' and the proceeds of the sale, after payment of expenses

of the action and of the sale, must be paid to the corporation. It is true the statute does not prescribe the form of notice of sale, or the manner of publication thereof; but it does require sale to be made within a year, and that the sale be a public one. (The sale is predicated upon the judgment effecting the escheat). The corporation has a direct interest in the sale, and the court has the power to protect the rights of the corporation as to the notice and conduct of the sale, by appropriate provisions in its judgment. Greenwood vs. Union Freight R. Co. 105 U. S. (15 Otto) at page 19, 26 L. Ed. at page 964; Church of Jesus Christ of L. D. S. vs. United States, 136 U. S. 1, 34 L. Ed. 478, 10 S. Ct. 792."

Appellant's third contention under Point I is that the ten year period provided in the act for the disposal of lands was, under the conditions as they existed, so inadequate as to amount to confiscation.

In support of this contention appellant refers to the economic situation during that ten year period, and contends that such economic condition depressed the market value of lands to such an extent as to render it practically impossible for corporations to dispose of their lands at anything like their actual value within the ten year period; that, therefore, the application of the statute would deprive the appellant, and other corporations similarly situated, of property without due process of law.

This argument, however, is untenable. Economic conditions may some times render the operation of a law oppressive, but that fact alone does not violate constitutional inhibitions. It is elementary that the validity of a statute must be determined solely upon the question

whether it is within the purview of legislative powers as limited by Federal and State Constitutions. 11 Am. Jur. 803, 16 C. J. S. pp. 471 et seq.; State ex rel. Linde vs. Taylor, 33 N. D. 76, 156 N. W. 561, LRA 1915B, 156.

It is fundamental that the justice, wisdom, necessity, utility or expediency of a law which is within their powers are for the lawmakers. 11 Am. Jur. 803, 804 et seq., 16 C. J. S. pp. 471 et seq.

The operation of a statute may temporarily create oppressive conditions, but it cannot be held invalid on that ground, unless its provisions contravene the State or Federal Constitution. As stated in 1 Cooley, Const. Lim. 8th ed. p. 345, "The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance." In the case of Lommen vs. Minnesota Gaslight Co. 65 Minn. 196, 208, 68 N. W. 53, 54, the court said, "The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the people themselves, or their legislative representatives."

On pages 30 and 31 of appellant's brief, we find the following statement:

> "It is a demonstrable fact that during the period from July 1932, corporations have not been able to dispose of their lands. It has been economically impossible for them to do so.
>
> North Dakota farmers have not been prevented from acquiring land, even at ridiculously low figures during the last decade.
>
> We learn from a report of the Works Progress Administration that there are potential

county lands (with five or more years' taxes delinquent) in the amount of 7,333,678 acres. That there are already county tax deeds for 2,106,103 acres and that the lands owned by the Bank of North Dakota and the Board of University and schools bring the total amount of such lands up to 13,258,021 acres. This huge reservoir of good land could be acquired by the farmers of North Dakota at very low prices."

Marginal references are then made to reports from the United States Department of Agriculture giving statistics showing relative sales in North Dakota as compared with the United States as a whole.

Statistics referring to the economic depression of the early thirties cannot avail as a legal argument to establish that the law challenged is invalid. However, since reference has been made to the economic depression of that period, it can also be shown by other statistics that from the year 1938 and on there has been a steady upward trend in the sale of lands in the state of North Dakota.

The University and School Land Department of the state of North Dakota had in the years prior to 1925 acquired considerable quantities of land through mortgage foreclosures, the result of loans made to farmers, secured by farm mortgages. A report of that department shows that prior to July 1, 1942 it had sold 1,411 farms, a total of 306,035 acres, at the price of $4,476,227. The average price per acre was $14.62. Some farms were sold for a lesser price per acre while other farms were sold for more, depending, of course, upon the locality of the land.

From the year 1919 and up to the year 1924 or 1925 the real estate loan department of the Bank of North

Dakota had acquired considerable quantities of land through mortgage foreclosures, resulting from loans made to farmers secured by farm mortgages. The report of the Land Department of the Bank of North Dakota for the year ending December 31, 1940 shows that during that year it sold 864 farms, a total of 199,578 acres, at the price of $1,802,860. The average price per acre was $14.23. Some farms brought as high as $22 an acre, the price, of course, depending upon the quality and location of the land.

The report of the department for the fiscal year ending June, 1942 shows that during that year the Bank sold 1,589 farms containing 388,475 acres at a sales price of $3,716,231. The average price per acre was $9.57, although some farms brought prices as high as $23, $20 and $17 per acre, depending upon the quality and location of the land.

The report of the same department for the year ending June 30, 1944 shows sales of 1,050 farms containing 248,933 acres at a sales price of $2,610,311. The average price per acre was $10.48, while some parcels were sold for a trifle less than the average, some parcels brought as high as $23 per acre. It is common knowledge that at the present time there is a great demand in the state for farm lands, and that there is a distinctive upward trend in land values in the state.

In its fourth contention under Point I the appellant contends that the North Dakota statute discriminates against it and in favor of corporations which acquired land by purchase after July, 1932, and deprives it of the equal protection of the law within the meaning of the 14th Amendment. On page 41 of appellant's brief appears this statement: "Corporations which acquire land by purchase after July, 1932 are not affected by

the law at all and may continue to hold such land without limitation or restriction indefinitely. This is obvious from a reading of the act."

The foregoing certainly is an erroneous statement of the provisions of the statute under consideration. Undoubtedly counsel for appellant has overlooked Section 10-0605 of the Act, which provides as follows:

> "The title and ownership of any real estate **acquired in any manner** by any domestic or foreign corporation since the approval and adoption of the initiated law of June 29, 1932 shall be valid for all purposes notwithstanding any provisions in said initiated law contained, **subject, however, to all of the provisions now contained in this chapter.**"

We direct the court's attention to the following language in the statute: "The title and ownership of any real estate **acquired in any manner** by any domestic or foreign corporation since the approval and adoption of the initiated law", and further, "**subject, however, to all of the provisions now contained in this chapter.**"

We fail to see how this language can be misunderstood because real estate acquired in any manner by corporations, domestic or foreign, are subject to all of the provisions now in the Act, and it provides specifically that all corporations, both domestic and foreign, which now own or hold rural real estate which was acquired prior to July 29, 1932 (Section 10-0602), and any corporation, domestic or foreign, which on or since July 1932 has acquired or hereafter shall acquire any rural real estate, (Section 10-0603), shall dispose of such real estate, except such as is reasonably necessary in the conduct of its business, within ten years from the date that it was so acquired.

The statute provides in clear, understandable English that it shall apply with like effect to all corporations acquiring property, both prior and subsequent to the effective date of the Act, since it specifically provides that the title and ownership of any real estate **acquired in any manner** by any domestic or foreign corporation since the approval and adoption of the Act shall be subject to all of the provisions now contained therein.

That the law applies with equal force to corporations acquiring land prior to the effective date of the Act, and subsequent thereto, cannot be expressed in language more clear and specific than that employed in the statute. It seems to us that further comment upon this feature of the law is entirely unnecessary.

We wish to call attention here to the fact that this point was not raised in the court below, and, therefore, in any event it is not an issue before this court.

Counsel further contends that under the exception in the statute corporations primarily formed for the purpose of acquiring, holding and dealing in land may freely do so without limitation or restriction because such corporations fall squarely within the exception written into the statute.

This point was not raised in the court below, and we fail to see how it can be an issue in the case at bar. However, the purpose of the statute is stated in Section 10-0601:

> "All corporations, both domestic and foreign, except as otherwise provided in this chapter, are hereby prohibited from engaging in the business of farming or agriculture."

It is clear that the purpose and intent of the statute is to prohibit corporations, both domestic and foreign,

from engaging in the business of farming or agriculture — that is, a corporation, whether domestic or foreign, may not engage in farming or agriculture as a business but the statute does not prohibit such a corporation from engaging in the business of buying and selling real estate.

The underlying purpose of the statute was to prohibit corporations from acquiring large areas of land and in effect create a monopoly to the detriment of individual farmers. North Dakota is an agricultural state, and the principal occupation of its citizens is farming and agriculture, and the purpose of the legislature in enacting this statute was to encourage individual citizens in acquiring and improving farms and establishing farm homes and the building up of prosperous rural communities.

We respectfully submit that the question as to whether corporations may engage in real estate business that is in the buying and selling of farm lands—is entirely beside the point and is not an issue here; but even if it were an issue, we do not see how the appellant could be prejudiced thereby because it is not engaged in a business which would bring it into competition with the class of corporations of which it complains.

The appellant next complains that Section 5 of the Act, that is Section 10-0604, permits cooperative corporations, seventy-five per cent of whose members or stockholders are actual farmers residing on farms or depending principally on farming for their livelihood, to acquire and hold real estate without limitation.

Long before the appellant acquired any land in North Dakota the state had in effect entirely separate

statutory provisions for the organization and control of ordinary corporations and for the organization of cooperative associations or corporations.

Chapter 10-02 of the North Dakota Revised Code of 1943 deals with the organization and perpetuation of ordinary corporations as that term is generally understood.

Chapter 10-15 of the North Dakota Revised Code of 1943 deals with the organization of cooperative associations or corporations.

We do not believe, therefore, that upon the facts and the record in this case the appellant is in position to raise the issue of discrimination between itself and cooperative associations or corporations. There is nothing in the record and facts of the case from which it would appear even remotely that the appellant is in any way prejudiced or at a disadvantage because cooperatives are exempted from the operation of the statute.

It is an elementary rule repeatedly announced with practical unanimity by the courts of the land, including the Honorable Supreme Court of the United States, that a person may question the constitutionality of a statute only when and insofar as it is sought to be applied to his disadvantage. Rindge Co. vs. Los Angeles County, 262 U. S. 700, 67 L. ed. 1186, 43 S. Ct. 689; Minot Special School Dist. vs. Olsness, 53 N. D. 683, 686, 208 N. W. 968, 45 ALR 1337; Premier-Pabst Sales Co. vs. Grosscup, 298 U. S. 226, 80 L. ed. 1155, 56 S. Ct. 754; Henneford vs. Silas Mason Co. 300 U. S. 577, 81 L. ed. 814, 57 S. Ct. 524; 16 CJS pp. 161, 162. "One attacking the constitutionality of a statute is not the champion of any rights except his own." Henneford vs. Silas Mason Co. supra.

We quote further from 16 CJS pp. 161, 162:

> "One may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right."

We quote also from Premier-Pabst Sales Co. vs. Grosscup, 298 U. S. 226, 80 L. ed. 1155:

> "We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him."

We quote also from the opinion of the North Dakota Supreme Court in the case of Asbury Hospital v. Cass County, et al., 72 N. D. 359, 7 N. W. 2d 438 (R. 58):

> "The plaintiff is not a co-operative corporation. It is not engaged in farming or agriculture. It cannot be injured by the provisions of the statute which discriminates in favor of co-operative corporations '75 per cent of whose members or stockholders are actual farmers, residing on farms or depending principally on farming for their livelihood,' and against co-operative corporations 75 per cent of whose members or stockholders are not 'actual farmers, residing on farms or depending principally on farming for their livelihood.' According to

the allegations of the plaintiff's complaint, injury is threatened to it only under the provisions which required corporations who had acquired rural real estate, used or usable for farming, at or prior to the effective date of the statute, to dispose of such real estate within ten years thereafter."

We quote also from the case of German Alliance Ins. Co. vs. Lewis, 233 U. S. 389, 58 L. ed. 1011, in which the Supreme Court of the United States was considering whether the exemption of Farmers Mutual Ins. Companies from a law applying to another insurance company made the act discriminatory. The court said:

"The distinction is therefore between co-operative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statutes of Kansas for the organization of co-operative companies, and if the statute under review discriminates between them the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. Ozan Lumber Co. v. Union County Nat. Bank, 202 U. S. 623, 50 L. ed. 1176, 26 Sup. Ct. Rep. 768. There are cer-

tainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the legislature. Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281."

It clearly appears, therefore, that appellant's contention that the exception in favor of cooperatives is discriminatory is absolutely without merit and has no bearing upon the issues in this case.

POINT II

In the second point of its arguments appellant contends that the statute challenged impairs the obligation of contract within the meaning of Article 1, Section 10, of the Constitution of the United States.

The contention is made that since the appellant acquired the land prior to the enactment of the challenged statute, it did so without limitation or restriction of any kind; that it acquired vested contract rights and that such contract rights are impaired by the application of the law.

We fail to see any force or merit to this contention. As has been pointed out in other portions of this brief, the appellant is a Minnesota corporation, and its charter was issued by that state. It was organized for religious and charitable purposes solely. It had no other rights than those granted to it by the Minnesota charter.

The fact that it acquired land in North Dakota by comity or acquiescence gave it no vested rights. It was bound to take notice of the Constitution and statutes of the state of North Dakota and its reserved powers

that it might exercise with reference to the rights and privileges of foreign corporations. No implied contract could result from the fact that it was permitted to take title to land, and, therefore, it could not complain of impairment of any vested rights or impairment of contract obligations under Article 1, Section 10, of the Federal Constitution.

Counsel for appellant cites the cases of Herndon v. Chicago Rock Island Pac. Ry. Co., 218 U. S. 135, 54 L. ed. 970, and Western Union Tel. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355. Neither of these cases are in point. The case of Western Union Tel. Co. v. Kansas, supra, has been previously discussed in this brief.

Both cases involved statutes placing undue burden upon interstate commerce, and no such question is present in the instant case.

We believe the following statement from the opinion of the Supreme Court of the state of North Dakota in the case of Asbury Hospital v. Cass County, et al., 72 N. D. 359, 7 N. W. 2d 438 (R. 58), is directly in point:

> "The plaintiff also contends that the statute is violative of Sec. 2 of Article 4 of the Constitution which provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' This contention is clearly devoid of merit. It is settled beyond controversy that a corporation is not a citizen within the meaning of Sec. 2 of Article 4, of the Federal Constitution or of Sec. 1 of Article 14 of the Amendments to the Federal Constitution as to the privileges and immunities of citizens. Orient Ins. Co. vs. Daggs, 172 US 557, 43 L.

Ed. 552, 19 S. Ct. 281, supra; Waters-Pierce Oil Co. vs. Texas, 177 US 28, 45, 44 L. Ed. 657, 664, 20 S. Ct. 518; 12 Am. Jur. 100, 23 Am. Jur. 259, 8 Fletcher, Cyc. Corp. p. 449."

CONCLUSION

Briefly stated, the appellant contends that the provision in the North Dakota corporation farming statute to the effect that in cases of failure of a corporation to dispose of its land within ten years from the effective date thereof, the land shall escheat to the county through judicial proceedings for the purpose of disposing of it at public sale, deprives the corporation of its property without due process of law and impairs vested contract rights, notwithstanding payment to the corporation of the proceeds and its right to be a bidder at the sale.

Appellant further contends that the statute is discriminatory in that it exempts from its operation cooperative corporations and associations, seventy-five per cent of whose members or stockholders are actual farmers residing on farms or depending principally upon farming for their livelihood, and, therefore, is violative of the equal protection clause of the Federal Constitution, notwithstanding such cooperatives in no way competes with the appellant in its business.

We submit that the appellant has failed to establish any of the foregoing contentions, and that the record and facts in this case clearly show that none of its constitutional rights have been violated.

The claim of the appellant that its rights have been violated hinges upon the question whether or not the escheat proceedings by the county resulting in a judg-

ment providing for the sale of the land at public sale constitutes taking property without due process of law. When a public sale is had under judicial proceedings ordered by a court of equity, the rights of interested parties are protected, and the price received at the sale is the reasonable market value of the property sold.

When, therefore, the proceeds of the sale have been paid to the owner, such owner has been compensated as a matter of law. The property has been exchanged for its monetary value according to the prevailing market price, and the owner has no further interest therein.

It is conceded that the land acquired by the appellant in North Dakota was not necessary in the conduct of its business under its charter granted by the state of Minnesota. It had no rights under any contract, expressed or implied, with the state of North Dakota. When the appellant acquired land in North Dakota, it did so subject to the provisions of its Constitution and laws, and the reserved power to enact regulatory statutes dealing with corporations, domestic and foreign. It is conceded that appellant acquired its land in North Dakota for investment only, and it requires no refined reasoning to establish that such investments are subject to such laws and regulations as the legislature may see fit to make.

We respectfully submit that the appellant has failed to establish that the North Dakota corporation farming statute is violative of any rights guaranteed to it by Article 1, Section 10, of the Constitution of the United States, or Section 1 of the 14th Amendment, and that, therefore, the decision of the Supreme Court

of the state of North Dakota in the premises should in all things be affirmed, and appellant's appeal dismissed.

Respectfully submitted,

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APPENDIX

CHAPTER 10-06

CORPORATE FARMING LAW

Section

10-0601 Farming by domestic and foreign corporations prohibited.

10-0602 Disposal of agricultural lands; ownership limitation covenant running with land.

10-0603 Disposal of lands acquired subsequent to July 29, 1932; ownership limitation a covenant.

10-0604 Cooperative corporations exempted; when.

10-0605 Title to farm lands acquired by corporation since July 29, 1932 valid.

10-0606 Land of noncomplying corporation sold by county; proceeds paid to corporation.

"10-0601. FARMING BY DOMESTIC AND FOREIGN CORPORATIONS PROHIBITED. All corporations, both domestic and foreign, except as otherwise provided in this chapter, are hereby prohibited from engaging in the business of farming or agriculture."

"10-0602. DISPOSAL OF AGRICULTURAL LANDS; OWNERSHIP LIMITATION COVENANT RUNNING WITH LAND. All corporations, both domestic and foreign, which now own or hold rural real estate which was acquired prior to July 29, 1932 and which is used or usable for farming or agriculture, except such as is reasonably necessary in the conduct of their businesses, shall dispose of the same on or before July 29, 1942, and said corporations may farm and use said real estate for agricultural purposes until such date. The ownership limitation provided by this section shall be deemed a covenant running with the title to the land against any grantee, successor, or assignee of a corporation, which is also a corporation."

"10-0603. DISPOSAL OF LANDS ACQUIRED SUBSEQUENT TO JULY 29, 1932; OWNERSHIP LIMITATION A COVENANT. Any corporation, either domestic

or foreign, which, on or since July 29, 1932, has acquired or hereafter shall acquire any rural real estate, used or usable for farming or agriculture, by judicial process or operation of law or pursuant to section 10-0605, shall dispose of such real estate, except such as is reasonably necessary in the conduct of its business, within ten years from the date that it was so acquired. During said ten year period, the corporation may farm and use such lands for agricultural purposes. The ten year limitation provided by this section shall be deemed a covenant running with the title to the land against any grantee, successor, or assignee of such corporation, which also is a corporation."

"10-0604. COOPERATIVE CORPORATIONS EXEMPTED; WHEN. Nothing in this chapter shall be construed to prohibit cooperative corporations, seventy-five per cent of whose members or stockholders are actual farmers residing on farms or depending principally on farming for their livelihood, from acquiring real estate and engaging in cooperative farming or agriculture."

"10-0605. TITLE TO FARM LANDS ACQUIRED BY CORPORATION SINCE JULY 29, 1932 VALID. The title and ownership of any real estate acquired in any manner by any domestic or foreign corporation since the approval and adoption of the initiated law of June 29, 1932 shall be valid for all purposes notwithstanding any provisions in said initiated law contained, subject, however, to all of the provisions now contained in this chapter. It shall be lawful for any corporation, domestic or foreign, subject to the other provisions of this chapter, to take and acquire title to real estate by deed or other conveyance where such deed or conveyance is taken or given in exchange for lands acquired prior to March 7, 1935 or in partial or in full satisfaction of any mortgage, lien, or other encumbrance held or owned by such corporation on such real estate. Any and all deeds and conveyances of real estate taken by any corporation prior to March 7, 1935, either in exchange for lands theretofore acquired or in partial or in full satisfaction of any

mortgage, lien, or other encumbrance on such real estate, shall be valid for all purposes."

"10-0606. LAND OF NONCOMPLYING CORPORATION SOLD BY COUNTY; PROCEEDS PAID TO CORPORATION. In case any corporation, either domestic or foreign, violates any provision of this chapter or fails, within the time fixed by this chapter, to dispose of any real estate to which it has acquired title and which is not reasonably necessary for the conduct of its business, then title to such real estate shall escheat to the county in which such real estate is situated upon an action instituted by the state's attorney of such county, and such county shall dispose of the land within one year at public auction to the highest bidder, and the proceeds of such sale, after all expenses of such proceedings shall have been paid, shall be paid to the corporation which formerly owned the land."

SUPREME COURT OF THE UNITED STATES.

No. 35.—October Term, 1945.

Asbury Hospital, a Corporation, Appellant, vs. Cass County, North Dakota, a Public Corporation, R. F. Croal, as States Attorney of Cass County, North Dakota, et al.	Appeal from the Supreme Court of the State of North Dakota.

[November 5, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Appellant, a Minnesota non-profit corporation, sought, in the state district court of North Dakota, a declaratory judgment that the so-called Initiative Measure of 1932, North Dakota Laws, 1933, pp. 494, 495, as amended by Chap. 89, Laws 1933, and Chap. 111, Laws 1935, is unconstitutional as applied to appellant's North Dakota farming lands.

The challenged statute declares, §§ 2, 3, that corporations, both domestic and foreign, which "now own or hold rural real estate, used or usable, for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall dispose of the same within ten years from the date that this Act takes effect . . .", and that "the ten year limitation provided by this Section shall be deemed a covenant, running with the title to the land against any grantee, successor of (or) assignee of such corporation, which is also a corporation." Farming land in the state owned by any corporation in violation of the statute is, by § 5, made subject to escheat to the county in which it is located, by suit instituted by the county attorney. The county is required to dispose of the land at public auction to the highest bidder within one year after escheat, and to pay the proceeds, less the expenses of sale, to the former corporate owner.

Appellant alleges in its amended complaint that prior to the enactment of the statute it had acquired a tract of land within Cass County, North Dakota, in satisfaction of a mortgage indebtedness, and that it has since leased the property out to farmers who have used it as farm land. The amended complaint fur-

ther alleges that since the enactment of the statute appellant has constantly attempted to sell this tract, and that it has been and will be unable to sell it for an amount equal to the original mortgage debt before the expiration of the statutory ten year period; that any sale which the county, proceeding under the statute, might be able to make, would be for substantially less than the amount appellant has invested in the land and the costs of sale. The amended complaint sets up that the statute, as applied to appellant's tract, violates the privileges and immunities clauses of Article IV, § 2 and the Fourteenth Amendment of the Federal Constitution, the contract clause, Article I, § 10, and the due process and equal protection clauses of the Fourteenth Amendment, and prays for a judgment that the statute is unconstitutional and void as applied to appellant and for an injunction restraining respondent county from enforcing the statute.

The Supreme Court of North Dakota sustained an order of the trial court overruling appellee's demurrer to the amended complaint, 72 N. D. 359. Upon remand of the case for further proceedings, the trial court found the allegations of fact set out in the amended complaint to be true, construed the statute as applicable to appellant's land, which was held not to be necessary to the conduct of appellant's business, and sustained the constitutionality of the statute in all respects. The Supreme Court of North Dakota affirmed. — N. D. —, 16 NW 2d 513. The case comes here on appeal under § 237(a) of the Judicial Code, 28 U. S. C. 344(a), appellant repeating in its assignments of error the attack made on the statute by its complaint.

Appellant does not invoke the commerce clause, and is neither a citizen of a state nor of the United States within the protection of the privileges and immunities clauses of Article IV, § 2 of the Constitution and the Fourteenth Amendment. *Paul* v. *Virginia*, 8 Wall. 168, 177; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 187; *Selover, B. & Co.* v. *Walsh*, 226 U. S. 112, 126. The State of North Dakota has granted no charter or certificate of incorporation to appellant, and has issued to it no permit to do business or own property within the state which could give rise to contract rights which appellant could assert against the state. None are to be implied from appellant's mere acquisition of land in the state either before or after the enactment of the statute. *Erie Ry. Co.* v. *Pennsylvania*, 21 Wall. 492; *Connecticut*

Mutual Life Ins. Co. v. *Spratley*, 172 U. S. 602, 620-622; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 344-5.

The Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it. *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 312-315; *Hooper* v. *California*, 155 U. S. 648, 652; *Munday* v. *Wisconsin Trust Co.*, 252 U. S. 499; *Crescent Oil Co.* v. *Mississippi*, 257 U. S. 129, 137. While recognizing the unqualified power of the state to preclude its entry into the state for these purposes, appellant points out that the state has permitted it to enter and to invest its money in obligations secured by mortgage on land within the state, in consequence of which it lawfully acquired the land free of restrictions. Appellant argues that the state may not, by later legislation, force a sale of the land thus innocently acquired, under conditions which do not allow recovery of the original investment. But a state's power to exclude a foreign corporation, or to limit the nature of the business it may conduct within the state, does not end as soon as the corporation has lawfully entered the state and there acquired immovable property. Subsequent legislation excluding such a corporation from continuing in the state has been sustained as an exercise of the general power to exclude foreign corporations which does not offend due process. *Hammond Packing Co.* v. *United States*, 212 U. S. 322, 342-3; see also *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 83. Similarly, this Court has upheld legislation imposing burdens greater than those to which such corporations were subject at the time of their entry on the ground that the state might exclude them altogether at a later date. *Phila. Fire Association* v. *New York*, 119 U. S. 110; *Horn Silver Mining Co. v. New York*, *supra*; see also *Crescent Oil Co.* v. *Mississippi*, *supra*; *Lincoln National Life Ins. Co.* v. *Read*, 1944 Term, decided June 11, 1945. Appellant, even if its activities in North Dakota are now restricted to the ownership of farm land within the state, stands in no better position to invoke the protection of the Fourteenth Amendment. The total exclusion of a corporation owning fixed property within a state requires it to sell or otherwise dispose of such property. Appellant must do no more. While appellant is not compelled by the present statute to cease all activities in North Dakota, the greater power includes the less.

Since the st e may validly require appellant to sell its farm land, the contention that the statute is wanting in due process because conditions have been such since its enactment that appellant has been and will be unable to salvage an investment made more than ten years before raises no substantial constitutional question. The due process clause does not guarantee that a foreign corporation when lawfully excluded as such from ownership of land in the state shall recapture its cost. It is enough that the corporation, in complying with the lawful command of the state to part with ownership, is afforded a fair opportunity to realize the value of the land, and that the sale, when required, is to be under conditions reasonably calculated to realize its value at the time of sale. No reason is advanced for saying, and we cannot say that the period of ten years allowed to appellant to dispose of the property, or its sale after ten years at public auction held under direction of the court and comparable generally to a mortgage foreclosure sale, fails to satisfy either of these conditions. As the North Dakota Supreme Court pointed out in its opinion, the statutory escheat of appellant's land is effected by suit to which the corporation must be a party, with full opportunity to be heard in advance. The judgment of sale in conformity to the statute is entered by the court which "has the power to protect the rights of the corporation as to the notice and conduct of the sale by appropriate provisions in its judgment."

Appellant makes the further objection that the statute denies due process because it deprives him of the possession of the property during the period from the time of escheat to the date of public sale, and makes no provision for any accounting for the rents and profits of the land during that period. The state's Attorney General argues that in the escheat proceeding the court has power to require and will require such an accounting. The record does not disclose that this objection was raised or considered by any court in the course of the present suit, or that any state court has construed the statute so as to determine whether a corporation whose land has been escheated will be deprived of the rents and profits pending the sale.

We are thus asked to pass on the constitutionality of a possible application of the state statute in advance of its application to appellant, and of its authoritative construction by the state courts.

Lacking such construction, without which no constitutional question can arise, the issue is not an appropriate one for adjudication by the declaratory judgment procedure. This Court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied. *Alabama State Federation of Labor* v. *McAdory*, No. 588, October Term 1944, decided June 11, 1945, slip opinion, pp. 6-8, and cases cited.

Only two of the equal protection contentions which appellant presses here appear to have been presented to or considered by the state courts. The North Dakota Supreme Court held that the statute's exception from its operation, of lands owned and held by corporations whose business is dealing in farm lands, (§ 2), and of the lands belonging to cooperative corporations, seventy-five percent of whose members or stockholders are farmers residing on farms, or depending principally on farming for their livelihood, (§ 4), did not deny the equal protection claimed. We agree.

The legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose. The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made. *Metropolitan Company* v. *Brownell*, 294 U. S. 580, 583, and cases cited. We cannot say that there are no differences between corporations generally and those falling into the excepted classes which may appropriately receive recognition in the legislative application of a state policy against the concentration of farming lands in corporate ownership.

The North Dakota Legislature may have thought that its policy with reference to corporate owned agricultural lands would be advanced by permitting corporations engaged in the business of dealing in farm lands to acquire and sell without restriction lands forced upon the market by the statute. It could have thought that its policy would be in part defeated by withholding authority from farm cooperatives to acquire and use farm lands for agricultural purposes. Cf. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 562-564. Statutory discrimination between classes which are

in fact different must be presumed to be relevant to a permissible legislative purposes, and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357; *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 509, and cases cited.

Appellant also asserts that the statute imposes an unconstitutional discrimination because §§ 2, 3 provide that any corporation which acquired farm land in any manner prior to 1932 the effective date of the Act, or by judicial process or operation of law thereafter, is required to dispose of it within the ten year period, while a corporation which acquired land by deed or grant after 1932 may hold it without restriction. But § 4, as amended by Chapter 89 of the North Dakota Laws of 1933, provides: "That the title and ownership of any real estate acquired, in any manner, by any domestic or foreign corporation, since the approval and adoption of the aforesaid initiated law, is hereby declared to be legal and valid for all purposes, notwithstanding any provisions in said initiated law contained, but subject however, to all of the provisions now contained in said initiated law as hereby amended and reenacted."

This section was not construed by any state court in the present litigation and we are not advised why farming lands acquired in conformity to § 4 are not, as the section declares, made "subject . . . to all of the provisions now contained" in the Act as amended, including those relating to the escheat and sale of farming lands. Nor does it appear that any such discrimination is in fact made in the enforcement of the statute. As we have already pointed out in this opinion, a constitutional question which turns on the construction and application of a statute which has neither been authoritatively construed nor applied by the state courts may not appropriately be decided by this Court. *Alabama State Federation of Labor* v. *McAdory*, *supra*, and cases cited.

The North Dakota Supreme Court, in its opinion, and counsel, in brief and argument here, confined their discussion to the question whether the state's powers over a foreign corporation as such justify the compulsory disposition of its farm land within the state. We need not, for present purposes, have recourse to other possible sources of state power to control the ownership and

disposition of property lying within its borders. We have considered but find it unnecessary to discuss other arguments of lesser moment.

We dismiss the appeal insofar as it draws in question the constitutionality of the act for its alleged failure to require an accounting for rents and profits of the land in the interval between the judgment of escheat and the sale of the land, and insofar as North Dakota farming lands acquired by corporations by deed or grant subsequent to 1932 are said to be exempted from the operation of the statute. In all other respects the judgment is affirmed.

So ordered.

Mr. Justice BLACK is of the opinion that the appeal should be dismissed for want of a substantial federal question.

Mr. Justice JACKSON took no part in the consideration or decision of this case.